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A TREATISE

ON

STATE AND FEDERAL CONTROL

OF

PERSONS AND PROPERTY

IN THE

UNITED STATES

CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT.

BY

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CHAPTER X.

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§ 133. **What is meant by "private property in lands?"** — An accurate answer to this question is exceedingly important, because attacks have repeatedly been made

upon the existing land tenure of England and the United States by political economists, as being the chief cause of human woes; and promises are made of the advent of an era of universal prosperity, only a little short of millennium, if private property in land be only abolished. The latest writer upon this subject, Mr. Henry George, has created no little stir by his vigorous attacks upon private property in land, and has succeeded, in no small degree, in unsettling preconceived notions of the right to own land. Our interest in this connection, as a jurist and a student of police economics, lies chiefly in Mr. George's conceptions of the existing law of real property, and the meaning he and other political economists attach to the phrase "private property in land." If we have not mistaken the writer's main idea, it is no less and no more than what is set forth by Mr. Herbert Spencer in his Social Statics,[1] with a greater display of rhetoric, however, and an elaborate scheme for the confiscation of the so-called "private property in land." Both writers present their views under the impression that the existing law recognizes an absolute right of private property in land, and they both propose that this private property be abolished, and land become the common property of all, of the State or society.

Mr. Spencer's entire argument is based upon his first principle of sociology: "Every man has freedom to do all that he wills provided he infringes not the equal freedom of any other man," and in applying this principle — which we most hearily indorse as the ruling principle of police power in the United States,[2] and the necessary fundamental principle in every system of sociology in a free State — to the right of property in land, he maintains that no one "may use the earth in such a way as to prevent the rest from similarly using it; seeing that to do this is to assume

[1] pp. 130–144.

[2] See *ante*, secs. 1, 2.

greater freedom than the rest, and consequently to break the law." Both writers maintain that land is the free gift of nature, and must ever remain the inalienable property of society. But Mr. Spencer, readily perceiving the practical objections that might be raised to his scheme of a common property in lands, if left unqualified, proceeds to deny that we must, as a result of a common property in lands, "return to the times of uninclosed wilds, and subsist on roots, berries and game." In further explanation of this scheme he says: "Such a doctrine is consistent with the highest state of civilization; may be carried out without involving a community of goods; and need cause no very serious revolution in existing arrangements. The change required would simply be a change of landlords. Separate ownerships would merge into the joint stock ownership of the public. Instead of being in the possession of individuals, the country would be held by the great corporate body—society. Instead of leasing his acres from an isolated proprietor, the farmer would lease them from the nation. Instead of paying his rent to the agent of Sir John or his Grace, he would pay it to an agent or deputy agent of the community. Stewards would be public officials, instead of private ones; and tenancy the only land tenure."[1] Tersely stated, Mr. Spencer's idea is that all men must become tenants of the State or of society, and must pay rent to the State for the exclusive use of the land. Mr. George's proposition is essentially the same. He says: "I do not propose either to purchase or to confiscate private property in land. The first would be unjust; the second needless. Let the individuals who now hold it still retain, if they want to, possession of what they are pleased to call *their* land. Let them continue to call it *their* land. Let them buy and sell, and bequeath and devise it. We may safely leave them the shell, if we take the kernel. *It is not necessary to confiscate land; it is only*

[1] Social Statics, p. 141.

necessary to confiscate rent."[1] And in order that the State need not "bother with the letting of lands," secure the benefits arising out of the position of landlord without being subjected to its annoyances, he proposes to "appropriate rent by taxation."

Both writers recognize the absolute right of private property in the improvements which the possessor may put upon the land, and neither would claim the right of confiscation of them, directly or indirectly, except that Mr. George recognizes the right to confiscate those "improvements which in time become indistinguishable from the land itself."[2] But as a general proposition, they both recognized this right to the improvements, which are of course products of man's labor.

Mr. Spencer claims that this proposed tenantry is in strict conformity with his first principles. He says: "A state of things so ordered would be in perfect harmony with the moral law. Under it all men would be equally landlords; all men would be alike free to become tenants. A., B., C., and the rest, might compete for a vacant farm as now, and one of them might take that farm, without in any way violating the principles of pure equity. All would be equally free to bid; all would be equally free to refrain. And when the farm had been let to A., B., or C., all parties would have done that which they willed — the one in choosing to pay a given sum to his fellowmen for the use of certain lands — the other in refusing to pay that sum. Clearly, therefore, on such a system, the earth might be inclosed, occupied, and cultivated, in entire subordination to the law of equal freedom." In effect, Mr. George's position is identical. They both assert the natural right of one man to the exclusive possession of a tract or plot of land, for the period of his tenancy, provided he pays the proper

[1] Progress and Poverty, p. 364.

[2] Progress and Poverty, p. 308.

rent or equivalent to society. Who is to determine what rent would be a fair equivalent for the right or privilege thus secured? Clearly, the legal representative of society in its organized condition, in other words, the government of the State.

If the tenancy be for one year, of course the rent will in proportion be smaller than what would be payable in a tenancy for ten, twenty, one hundred, and one thousand years; and there would possibly be a different amount of rent exacted for a tenancy for the life of the tenant. Of course, legal limitations could be imposed upon the duration of the tenancy,[1] but would this be wise? May not cases arise, in which it would be no inducement for a tenant to make improvements, unless he was given a long lease? The desire for a permanent "local habitation" is very strong in the human breast, and Blackstone tells us that under the feudal system it was considered "that the smallest interest, which was worthy of a freeman, was one which must endure during his life."[2] Apart from any express legal restrictions, which of course may be imposed under this theory of property in lands, if the consideration or rent is adequate, there would be no more injustice to the rest of the human race to give one man the exclusive possession of a piece of land during his life, than it would be if his tenancy was only for one year. Having paid to society a fair equivalent for the use of the land, is society at all concerned in the manner of his using the land, provided he injures no one else? Would it be an act of natural injustice to society, if he for some satisfactory consideration lets some one else utilize the land, instead of doing so himself? The right of subletting is therefore a natural incident of a tenancy, unless expressly taken away.

One step farther: suppose society finds out that in a

[1] See *post*, § 134.

[2] 2 Bla. Com. 237.

given case it can procure, through individual activity, a long felt want, but the individuals in question will not undertake the project unless they have in certain lands a more permanent right of possession than what a tenancy for life gives them. Suppose society conclude that it must have this want supplied, and in order to gratify this desire it gives to these parties and to their heirs and assigns the exclusive possession of certain land, as long as they pay a certain rent, the amount of which is to be determined by society from time to time, and provided further, that the land may be at any time reclaimed by society, if the public exigencies shall require it, upon the payment to these parties or their heirs and assigns of a compensation for the loss of improvements, which have become inseparable from the land, and for future profits in the continued possession? Would such a contract be in violation of Mr. Spencer's first principle? Would not the State be still the ultimate owner of the land, and the so-called proprietor only vested with the right of possession and enjoyment, in other words, a qualified property? Would he not be essentially a tenant of the State, and his interest in the land a tenancy?

That is all "the private property in land" which the American and English laws recognize. The present writer has stated elsewhere [1] this limitation upon the right of property in land in the following language: —

"It may be stated as a general rule, though controverted by eminent authority, that in any system of jurisprudence, there cannot be an absolute ownership in lands. The right of property or interest in them must always be qualified, that interest being known in the English and American law as an *estate*. A man can have only an estate in the land, the absolute right of property being vested in the State. An estate has, in respect to the real property, the three elements, the right of possession, right of enjoyment, and

[1] Tiedeman on Real Property, § 19.

right of disposition, subject to the right of the State to defeat it, and appropriate it to the public use, or for the public good. In what cases, and under what circumstances, the State can exercise this power of appropriation, and to what extent the rights of possession, enjoyment and disposition, may be limited by the imposition of restrictions, depends upon the policy of each system of jurisprudence. In some States the restrictions are numerous, while in others they are few, the right of property being almost absolute in the individual. But nowhere can the private right of property be said to be absolute. The absolute right of property being in the State, the right of ownership, which an individual may acquire, must, therefore, in theory at least, be held to be derived from the State, and the State has the right and power to stipulate the conditions and terms upon which the land may be held by individuals. These conditions and terms, and the rights and obligations arising therefrom, constitute what is known as *tenure* or *land tenure*."[1]

Is not then this statement of the law correct? In the constitution of New York, Art. I, § 10, it is declared that "the people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State." And this is the implied, if not expressed, doctrine of the law in every State of this Union. Is there an acre of land in this country, that is not held subject to taxation and to the right of eminent domain? Taxation of real estate is essentially the same as rent, for it is not imposed as an obligation of citizenship. Although the power of taxation generally cannot properly be considered of feudal origin, yet in its application to real property it assumes a decidedly feudal character. If the power to tax real property rested solely upon the obligations of citizenship, then

[1] Tiedeman on Real Property, § 19.

it could only be levied upon those proprietors of lands who were citizens. As a matter of fact, all lands situated within the jurisdiction of the government which levies the tax are taxed for their proportionate share. The levying of a tax upon land and the enforcement of the levy, are usually proceedings *in rem* against the land, and not *in personam* against the proprietor.[1]

The right of eminent domain surely can rest only upon the claim that the State is the absolute proprietor of all lands within its jurisdiction, which consequently makes all private owners merely tenants of the State.[2]

Our conclusion therefore is that there is no "private property in land" in the sense in which Mr. Spencer and Mr. George employ the term, and the provisions of the law in respect to the tenancy of lands are in strict conformity with the principles they advocate. It may be, as Mr. George asserts, that certain cunning men in days gone by cheated society out of its dues, and obtained from it fee simple tenancies without rendering an adequate equivalent: and it may be true (we shall not question the proposition in this place), that the present returns to the State for the private enjoyment of these tenancies are grossly inadequate to the benefits thus received: Mr. George may possibly be just in his claim that taxation of lands ought to be increased far beyond its present rate; but the economic problem would be very much simplified, if it is clearly understood that the scheme proposed for the nationalization of land involves no legal, as it does an economic, revolution.

§ 134. Regulation of estates — Vested rights. — If it be true that the absolute property in land is in the State, it must follow as a logical consequence that, in the grant of lands to private individuals, the State may impose whatever

[1] See *post*, § 160.

[2] See *post*, § 139.

conditions and terms, under which the land is to be acquired, that may be deemed wise or necessary. For example, the United States government may institute whatever regulations it pleases for the sale of the public lands of the West. The right to acquire a private property in land is a privilege and not a right. The State may refuse altogether to sell, or exact whatever returns in the way of rents or public duties it pleases. But when the right to the public enjoyment of lands is purchased by the individual, it becomes a vested right, of which he cannot be divested by any arbitrary rule of law. There are several clauses of the constitutions which contain an express or implied prohibition of such interferences with vested rights; but the principal protection to vested rights is that guaranteed by the clause which declares that "no man shall be deprived of his * * * property, except by the judgment of his peers or the law of the land." It is not necessary in this place to discuss in general what is meant by vested rights, and what are considered to be such.[1] It is sufficient for us to be able to say that when one becomes the tenant of the State, or, in common parlance, acquires the absolute title to an estate in the land, whether that estate be in fee, for life, for years, or otherwise, his interest is a vested right, which is protected by the constitutional limitations against any arbitrary changes by legislation. But naturally, until the estate is acquired, the purchaser has no absolute right to purchase any particular estate in the land. It is fully competent for the legislature to determine what estates one may acquire in lands. For example, estates tail have been abolished in most of the American States. That is, the statutes of the different States have declared what shall be the effect of an attempt to create an estate tail. In Alabama, Cali-

[1] For a masterly exposition of this subject, see Cooley Const. Lim. 430–511.

fornia, Connecticut, Florida, Georgia, Kentucky, Maryland, Michigan, Minnesota, Mississippi, North Carolina, Tennessee, Texas, Wisconsin, Virginia and West Virginia, estates tail are converted into fees simple. In Arkansas, Illinois, Kansas, Missouri, New Jersey and Vermont, the tenant in tail takes a life estate, and the heirs of his body, the remainder in fee *per formam doni*. In Indiana and New York, the tenant takes a fee simple, if there is no limitation in remainder after the estate tail, and a life estate, where there is such a limitation. In Delaware, Maine, Massachusetts, Pennsylvania, and Rhode Island, estates tail are not expressly abolished, but an easy mode of barring the entail by a conveyance in fee simple is provided by statute.[1]

Another notorious example, of legislative interference with creation of estates in lands, is furnished by the enactment of Statutes of Uses, which provide for the union in the *cestui que use* of the legal and equitable estates.[2] In the same way are the incidents of estates being materially modified and changed by statute. The law of mortgages is constantly undergoing a change in every State, through the enactment of statutes and by judicial legislation. Joint tenancies have been converted into tenancies in common; estates at will have been changed to tenancies from year to year, and estates for years declared to be estates of inheritance, with all the incidents of freehold estates. There are many other such instances of legislative changes of the character and incidents of estates in lands, which may be ascertained by a reference to any work on Real Property. All such legislation, however radical it may be, will be clearly free from all constitutional objections, as long as it is not made to apply to existing estates. To declare, that hereafter no estate tail or use shall be created, does not infringe

[1] Tiedeman on Real Prop., § 2, n.; 1 Washb. on Real Prop. 112, note; Williams on Real Prop. 35, Rawle's note.

[2] Tiedeman on Real Prop., §§ 459–470.

any vested right, either of the vendor or vendee, or any third person in privity with either of them. But the effect would be very different if these statutes were made applicable to the existing estates of the prohibited kind. Whether the estate tail was converted into a fee simple or divided into a life estate in the first taker and a contingent remainder in the heirs of his body, or if the tenant in tail has the power given him to convert the estate into a fee simple by a conveyance; in any one of these three cases of legislation, the application of it to existing estates tail would violate the constitutional prohibition of interference with vested rights. Of course the heirs of the body have no vested rights,[1] but the reversioner or remainder-man, after the estate tail has.[2] Mr. Cooley states that "in this country estates tail have been generally changed into estates in fee simple, by statutes the validity of which is not disputed."[3] If the reversion or remainder after an estate tail be a vested right, and without exception the recognized authorities on the law of real property are agreed that these interests are vested rights, the conclusion is irresistible, that laws, changing estates tail into fees simple, are unconstitutional if applied to estates tail already created, when the laws were passed. Mr. Cooley says: "No other person (than the tenant in tail) in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases."[4] In a note to the above statement[5] he says that "the exception to this statement, if any, must be the case of a tenant in tail after possibility of issue extinct; where

[1] See *post*, § 135.

[2] Tiedeman on Real Prop., §§ 385, 398, 538; 2 Washb. on Real Prop. 737, 738; 2 Washb. on Real Prop. 546, 690.

[3] Cooley Const. Lim. 441, citing, in support of the proposition, De Mill *v.* Lockwood, 3 Blatchf. 56.

[4] Cooley Const. Lim. 441, 442, citing, 1 Washb. on Real Prop. 81–84.

[5] P. 442.

the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested." There cannot be any doubt whatever, that the conversion of an estate tail after possibility of issue extinct into a fee simple, would be in violation of the vested rights of the reversioner or remainder-man. For the estate tail after possibility of issue extinct is but a life estate.[1] But, in respect to the matter of being a vested right, there is no difference between the remainder or reversion after an ordinary estate tail, and one after an estate tail *after possibility of issue extinct.* There is no uncertainty as to the title in either case. The failure of issue in both simply determines when the reversion or remainder shall take effect in possession, and the uncertainty or impossibility of ever enjoying the estate in possession, never makes a remainder contingent.[2] It is true that in England the remainder after an estate tail was liable to be defeated by a common recovery, when suffered or instituted by the tenant in tail for the purpose of cutting off the entail.[3] And if common recoveries or some other mode of barring the entail had been previously recognized in this country, the remainder after the estate tail would be properly considered a contingent interest instead of a vested right, and could be further regulated by statute. Thus, for example, in Massachusetts, the tenant in tail can make a conveyance in fee simple, thus barring the contingent interest of the re-

[1] Tiedeman on Real Prop., § 51; 1 Washb. on Real Prop, 110, 111; 2 Sharswood Blackstone, 125.

[2] Tiedeman on Real Prop., § 401; Fearne Cont. Rem. 216; 4 Kent Com. 202; 2 Washb. on Real Prop. 547; Croxall *v.* Shererd, 5 Wall. 288; Pearce *v.* Savage, 45 Me. 101; Brown *v.* Lawrence, 3 Cush. 390; Williamson *v.* Field, 2 Sandf. Ch. 533; Allen *v.* Mayfield, 20 Ind. 293; Marshall *v.* King, 24 Miss. 90; Manderson *v.* Lukens, 23 Pa. St. 31; Maurice *v.* Maurice, 43 N. Y. 380; Furness *v.* Fox, 1 Cush. 134; Blanchard *v.* Blanchard, 1 Allen, 223.

[3] Williams on Real Prop. 253; 1 Spence Eq. Jur. 144; 2 Prest. Est. 460; Page *v.* Hayward, 2 Salk. 570.

mainder-man or reversioner. Another statute might very well be enacted, making the existing estates tail a fee simple, while they remain in the possession of the tenant in tail. Since the interest of the reversioner or remainder-man was already liable to be defeated by the arbitrary will of the tenant in possession, it was not a vested right, and, therefore, not protected by the constitutional limitations.

For the same reason, the right of survivorship in a joint tenancy cannot be considered a vested right. Apart from the fact, that the title to the interest of the co-tenant under the doctrine of survivorship, could not until his death become vested in the survivor, the co-tenant had the power to defeat the right of survivorship by his own conveyance of his undivided interest. The conveyance of a joint tenant's share in the joint tenancy converts it into a tenancy in common, as between the assignee and the other joint tenants.[1] It is, therefore, not difficult to justify on constitutional grounds the statute of Massachusetts, which converted existing joint tenancy into tenancies in common.[2] In the same way the enactment of a statute, converting existing trusts, which could not be executed by the English Statute of Uses, into legal estates, could not be considered unconstitutional, except where the effect would be to materially change the beneficial character of the rights of the *cestui que trust*. The title of the trustee is not a vested right which would be protected by these constitutional limitations. He holds it in trust for the *cestui que trust*, and if the latter has not been harmed by the transfer of the land to him, the trustee cannot complain. A law may be passed, abolish-

[1] Tiedeman on Real Prop., § 238; 1 Washb. on Real Property, 647, 648; Co. Lit. 273*b*. And the right of survivorship will *pro tanto* be defeated by a mortgage of a joint tenant's interest in a joint tenancy. York *v.* Stone, 1 Salk. 158; 1 Eq. Cas. Abr. 293; Simpson *v.* Ammons, 1 Binn. 175.

[2] Holbrook *v.* Finney, 4 Mass. 565 (3 Am. Dec. 243); Miller *v.* Miller, 16 Mass. 59; Annable *v.* Patch, 3 Pick. 360. See Bombaugh *v.* Bombaugh, 11 Serg. & R. 192.

ing the doctrine of "a use upon a use," and convert into legal estates all uses that remain unexecuted in consequence of this doctrine. It may possibly be claimed that in active trusts the trustee has a vested right to the compensation which the law allows him for the performance of his duties under the trust. But the claim is manifestly untenable. If the performance of his duties is rendered unnecessary by the transfer of the legal estate to the *cestui que trust*, he has not earned his compensation. One cannot be said to have a vested right to earn compensation by the performance of duties which have by law become unnecessary.[1]

Under the English Statute of Uses, which has been adopted without change in most of our States, the separate use to a married woman cannot be executed into a legal estate, because she cannot hold the legal estate free from the control of the husband, as she can the use or equitable estate.[2] A statute which converted such an existing estate into a legal estate, without providing for its remaining her separate property, would clearly be unconstitutional, as being in violation of vested rights. On the other hand, if a statute is passed, which declares that married women shall hold their legal estates as well as equitable estates free from the control or attaching rights of the husband, the use to a married woman which remained unexecuted by the statute, only on account of her disability to hold the legal estate independently of her husband, would at once become executed into a legal estate under the old Statute of Uses, without any express legislation to that effect.[3]

Some additional illustrations of what are vested rights in real estate, which may not be infringed by subsequent legis-

[1] See Adams *v.* Adams, 64 N. H. 224; In re Heinze's Estate, 46 N. Y. S. 247; and *contra* to the text, Oviatt *v.* Hopkins, 46 N. Y S. 959; 20 App. Div. 168.

[2] Tiedeman on Real Prop., § 469.

[3] See Sutton *v.* Aiken, 62 Ga. 733; Bratton *v.* Massey, 15 S. C. 277; Bayer *v.* Cockerill, 2 Kan. 292.

lation, may be added. Where, on the seashore, the bulkhead line for wharfs and piers is once established by law, and wharfs and piers are constructed in accordance with such law; the riparian owners have acquired a vested right in the privilege accorded by the law, which may not be interfered with or restricted by subsequent legislation, except in the exercise of the right of eminent domain, and upon payment of full compensation.[1] The same conclusion was reached in a case, where a certificate of purchase of swamp and overflowed lands was assigned to a non-resident purchaser, and a subsequent constitutional provision prohibited the grant of public lands to any but citizens and residents of the State. It was held that the rights, acquired by the assignee of the certificates of purchase, was vested, and could not be impaired by this subsequent constitutional prohibition.[2]

But inasmuch as the ultimate property in all lands which are held by private owners is in the State, and the private owner holds his estate subject to the superior claim of the State against the land for the payment of taxes which are levied against the land; the lien for taxes on the land takes precedence to the lien of a mortgage or judgment, even though the taxes, for which the lien may be enforced, may have been levied and have become due, after the execution of the mortgage or the filing of the judgment. This principle, in its application to general taxes, is too well settled and unquestioned to require citation of authorities.

But, in a recent case, the applicability of the principle to the lien for special assessments for public improvement has been questioned in Indiana. But the Supreme Court of that State held that a law did not interfere with the vested rights of a mortgagee, which provided that the lien

[1] Classen *v.* Chesapeake Guano Co., 81 Md. 288. See, to the same effect, Roberts *v.* Brooks, 71 Fed. 914.

[2] McCabe *v.* Goodwin, 106 Cal. 486.

for such a special assessment shall take precedence to the liens of existing mortgages.[1]

A State has not the power, by subsequent law, to release a grantee and his title from a condition which has been imposed by the grantors. But where the State itself imposes such a condition, it may remove it by subsequent legislation: As, where a corporation is authorized to hold land for a specified purpose only, this restriction may be removed by subsequent legislative enactments.[2]

A curious question of vested rights has arisen in connection with the effect on real estate values of the presence of certain institutions, public or semi-public, in a town or city. The location in a town of a State penitentiary, hospital, asylum or university, does not give to the property owners of the town any vested right in their continued location in the town, if the original location of the institution was not bartered for with the express agreement that it shall never be removed. In a recent case, the question was raised and answered in the negative, whether the property owners had a vested right in the continued location in their town of the seat of the State government.[3] The same answer was given in the case of a sectarian college, where it was understood, but not expressly agreed to by a valid contract, that the first location of the college would be permanent. A law authorizing its removal was held not to be an interference with any vested right of the property owners of the town.[4]

The same rule as to the power of the government to change remedies, enlarging or restricting them, or providing new remedies, without interfering with vested rights, applies to vested rights in real estate, as what controls the power of the government to regulate the enforcement of contracts in general, and which is fully set forth in a

[1] Murphy *v.* Beard, 138 Ind. 560.
[2] Gump *v.* Sibley, 79 Md. 165.
[3] Edwards *v.* Lesueur, 132 Mo. 410.
[4] Bryan *v.* Board of Education, 151 U. S. 639.

subsequent section.[1] As long as the change is made only in the remedy for the enforcement of the right, and a reasonable opportunity is afforded for the subsequent enforcement of the right, the constitutional provision is not infringed. Thus, a recent statute in Illinois changed the requirements of the notice to quit, in order to terminate a tenancy, or to recover possession, cutting down the period of notice in some cases, and requiring a notice in some cases in which theretofore no notice was required at all. It was held that, inasmuch as the statute only effected a reasonable change in the remedies, its enforcement against existing lessors and lessees did not impair any vested right.[2] The same conclusion was reached, in regard to laws which made tax deeds conclusive or only *prima facie* evidence of title. These laws were held to change or affect only the remedy.[3] So, also, a law, which requires sixty days' notice by purchaser of tax-title of the expiration of the period of redemption, affects only the remedy and may apply to sales made prior to its enactment.[4]

§ 135. **Interests in expectancy.** — Interests in expectancy, when distinguished from vested rights, are held not to be under the protection of the constitution, and may, therefore, be modified, changed, or completely abolished by subsequent legislation.[5] A purely contingent interest, to which there cannot be any present fixed title, cannot be considered a vested right. Where the vesting of a right depends under existing laws upon the future concurrence of certain circumstances or facts, the repeal of those laws

[1] See *post*, § 178.

[2] Woods *v.* Soucy, 166 Ill. 407.

[3] Harris *v.* Haisch, 29 Oreg. 562 (46 P. 141); In re Douglass, 41 La. Ann. 765; Ensign *v.* Barse, 107 N. Y. 329.

[4] Coulter *v.* Stafford, 56 F. 564; 6 C. C. A. 18; Heinrich *v.* Niesz (Wash.), 47 P. 414.

[5] Cooley Const. Lim. 440.

will operate to defeat the expectant interest. "A person has no property, no vested interest, in any rule of the common law. * * * Rights of property, which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations." [1]

For the reason that an interest in expectancy is not to be considered a vested right, it is the universally recognized rule of constitutional law that the right of inheritance of the heir presumptive is liable to be modified or entirely defeated by a legislative change in the law of descent. The law of descent varies according to the civil polity of each State, or, as Blackstone has it, it is "the creature of civil polity and *juris positivi*." Independently of positive law, the heir acquires no rights whatever in his ancestor's property. For public reasons, and with an incidental recognition of the moral right to the inheritance of those who stand in the most intimate blood relationship with the deceased owner, the law declares that property, which the owner leaves at his death undisposed of by grant or demise, shall descend to those named by the statute and in the order given. The expectant heir's right of inheritance rests altogether upon this command of positive law. A repeal of the law before the death of the ancestor would take away all authority for his claim of inheritance. It is, therefore, a well recognized and undisputed rule of law that the statute of descent, in force when the ancestor dies, determines the right of inheritance: *nemo est hæres viventis*.[2] But when the

[1] Waite, Ch. J., in Munn *v.* Illinois, 94 U. S. 113, 134.

[2] Cooley Const. Lim. 441; Story on Confl. Laws, § 484; Tiedeman on Real Prop., § 664; Potter *v.* Titcomb, 22 Me. 300; Miller *v.* Miller, 10 Met. 393; In re Lawrence, 1 Redfield Sur. Rep. 310; Smith *v.* Kelly, 23 Miss. 167; Marshall *v.* King, 24 Miss. 85; McGaughey *v.* Henry, 15 B. Mon. 383; Jones *v.* Marble, 6 Humph. 116; Price *v.* Talley, 10 Ala. 946; Eslava *v.* Farmer, 7 Ala. 543; Sturgis *v.* Ewing, 18 Ill. 176; Emmert *v.* Hays, 89 Ill. 11; Cooley Const. Lim. 441.

ancestor dies, and under the then existing statute of descent, the property is cast upon a particular individual as heir, the right of property becomes a vested right, and like all other vested rights, however acquired, it cannot be affected by subsequent legislation.

Of the same character are the rights which the husband and wife acquire in the real and other property of each other, by virtue of the marital relation existing between them. By rule of positive law, for more or less public reasons, these rights are granted. They do not depend upon contract, and do not emanate from the marriage contract. The acquisition of these rights is merely an incident of the marriage, made so by law.[1] If, therefore, the law upon which the claim to these marital rights of property rests, is repealed before the rights become vested, the expectant right would be defeated, because there would be no foundation for the claim of an existing right. The common law provided that the husband on his marriage would acquire an estate during coverture in all of the lands of the wife which she then owned, and, from the time of purchase, in all other lands which she may subsequently acquire.[2] Until she acquires a title to the lands by purchase or otherwise, the right to an estate in the lands is merely expectant. A law, which provides that married women shall hold their lands and other property free from

[1] "Dower is not the result of contract but a positive institution of the State, founded on reasons of public policy. To entitle to dower, it is true, there must be a marriage, which our law regards in some respects as a civil contract. So the death and seisin of lands by the husband during the coverture are also necessary to establish a right to this estate. But they are not embraced by, nor are they the subjects of the marriage contract. The estate is by law made an incident of the marriage relation and the death and seisin of one of the parties are conditions on which it comes into existence. It stands, like an estate by the curtesy, on the foundations of positive law." Moore *v.* City of New York, 8 N. Y. 110.

[2] Tiedeman on Real Prop., § 90; 1 Bla. Com. 442; 1 Washb. on Real Prop. 328, 329.

the attaching rights of the husband, would not be unconstitutional if made to apply to those already married, provided it was not allowed to affect the husband's vested rights in the property, acquired by the wife before the passage of the remedial statute. The statute can constitutionally cut off the husband's expectant interests in the property of the wife, acquired by her subsequently.[1] The same rule obtains in the Western States, in respect to the community property of their local law. Thus, it has been held in California that a statute, which restricts the husband's control over community property, in denying his right to transfer the same without the written consent of his wife, was unconstitutional in its application to such property which had been acquired prior to the enactment of the amendatory statute.[2]

The same principles will apply to tenancies by the curtesy, and to dower. Until the birth of a child, who was capable of inheriting the estate, the husband's curtesy was merely an expectant interest. Upon the birth of the child, the tenancy became initiate. The title vests in him absolutely. His right of possession as tenant by the curtesy is postponed until the wife's death, but the estate is so far a vested right upon the birth of issue, that he may convey it away, and it is subject to sale under execution for his debts.[3]

[1] Westervelt *v.* Gregg, 12 N. Y. 202; Norris *v.* Beyea, 13 N. Y. 273; Pugh *v.* Ottenheimer, 6 Ore. 231 (25 Am. Rep. 513); Mitchell *v.* Violett (Ky.), 47 S. W. 195; Bishop Law of Married Women, §§ 45, 46. In Massachusetts it has been held that the husband's contingent interest, as husband, in the right of property to which the wife is entitled subject to a contingency, is so far a vested right that it cannot be affected by remedial legislation. Dunn *v.* Sargent, 101 Mass. 336. See Plumb *v.* Sawyer, 21 Conn. 351; Jackson *v.* Lyon, 9 Cow. 664; Pritchard *v.* Citizen's Bank, 8 La. 130 (23 Am. Dec. 132).

[2] Spreckles *v.* Spreckles, 116 Cal. 339.

[3] Tiedeman on Real Prop., §§ 108, 109; Mattocks *v.* Stearns, 9 Vt. 326; Roberts *v.* Whiting, 16 Mass. 186; Litchfield *v.* Cudworth, 15 Pick. 28; Watson *v.* Watson, 13 Conn. 88; Burd *v.* Dansdale, 2 Binn. 80; Lancaster Co. Bk. *v.* Stauffer, 10 Pa. St. 398; Van Duzer *v.* Van Duzer, 6

Any law, which provided for the abolition of tenancy by the curtesy, could not constitutionally be made to apply to those cases, in which the tenancy by the curtesy has become a vested right by the birth of issue, and a concurrence of all the other conditions, which are necessary to the existence of the tenancy. For in such cases the tenancies by the curtesy have become vested rights.[1] But the law could apply to all the property of those already named, who have had no children, capable of inheriting the estate. And while the birth of issue and its death before the acquisition of the property by the wife, will be a sufficient performance of this condition, to enable the husband's tenancy by the curtesy to attach, as soon as the property is acquired by the wife;[2] yet until the property is acquired, the right to the tenancy by the curtesy in such property is so far an interest in expectancy, that it may be taken away by statute.

On the other hand, the wife's dower is inchoate until the death of her husband. Neither he nor his creditors can by any act deprive her of her dower during coverture;[3] and it is so far a mere expectant interest, that she can neither assign, release, nor extinguish it, except by joining in the deed of her husband. It cannot during coverture be considered even a *chose in action;* and it is not affected by any adverse possession, although such possession is sufficient to bar the husband's interest in the land.[4] Although the

Paige, 366; Day *v.* Cochrane, 24 Miss. 261; Canby *v.* Porter, 12 Ohio, 79. Equity will not interfere in behalf of the wife or children. Van Duzer *v.* Van Duzer, 6 Paige, 366.

[1] Hathon *v.* Lyon, 2 Mich. 93; Long *v.* Martin, 15 Mich. 60. In Illinois, the husband's curtesy is by statute given the character of the wife's dower. It is, therefore, in that State, subject to change by statute, until the death of the wife makes it a vested right. Henson *v.* Moore, 104 Ill. 403; McNeer *v.* McNeer, 142 Ill. 388.

[2] Tiedeman on Real Prop., § 108; Williams on Real Prop. 228, Rawle's note; Dubs *v.* Dubs, 31 Pa. St. 154; Lancaster Co. Bk. *v.* Stauffer, 19 Pa. St. 398.

[3] Tiedeman on Real Prop., §§ 115, note, 126.

[4] Tiedeman on Real Prop., § 115; Durham *v.* Angier, 20 Me. 242; Moore

authorities are not altogether unanimous, the overwhelming weight of authority recognizes the dower during coverture as being so far inchoate and an interest in expectancy, that it may be changed, modified, or altogether abolished by statute.[1] There is no unconstitutional interference with vested rights, as far as the dower right is concerned, whether it is by statute increased, diminished, or completely abolished. But where the dower estate is enlarged in the lands already possessed by the husband, there is a clear violation of his vested rights, because the incumbrance upon his estate has been increased. It would be the same, in respect to the wife's property, if the husband's tenancy by curtesy or other marital rights in her property were enlarged by

v. Frost, 3 N. H. 127; Gunnison *v.* Twitchell, 38 N. H. 68; Learned *v.* Cutler, 18 Pick. 9; Moore *v.* New York, 8 N. Y. 110; McArthur *v.* Franklin, 16 Ohio St. 200. But see Somar *v.* Canaday, 53 N. Y. 298 (13 Am. Rep. 523); White *v.* Graves, 107 Mass. 325 (9 Am. Rep. 38); Buzick *v.* Buzick, 44 Iowa, 259 (24 Am. Rep. 740), in which the inchoate dower is considered as a vested interest, so far as to enable a wife for its protection to secure in equity a cancellation of a deed, containing her renunciation of dower, which had been procured by the fraud of the purchaser.

[1] Barbour *v.* Barbour, 46 Me. 9; Merrill *v.* Sherburne, 1 N. H. 199 (8 Am. Dec. 52). See Ratch *v.* Flanders, 29 N. H. 304; Jackson *v.* Edwards, 7 Paige, 391; *s. c.* 22 Wend. 498; Moore *v.* City of New York, 4 Sandf. S. C. 456; *s. c.* 8 N. Y. 110; Melizet's Appeal, 17 Pa. St. 449; Phillips *v.* Dinsey, 16 Ohio, 639; Weaver *v.* Gregg, 6 Ohio, St. 547; Noel *v.* Ewing, 9 Ind. 37; Logan *v.* Walton, 12 Ind. 639; May *v.* Fletcher, 40 Ind. 575; Carr *v.* Brady, 64 Ind. 28; Pratt *v.* Tefft, 14 Mich. 191; Guerin *v.* Moore, 25 Minn. 462; Bennett *v.* Harms, 51 Wis. 25; Henson *v.* Moore, 104 Ill. 403, 408, 409; Lucas *v.* Sawyer, 17 Iowa, 517; Sturdevant *v.* Norris, 30 Iowa, 65; Cunningham *v.* Welde, 56 Iowa, 369; Ware *v.* Owens, 42 Ala. 212; Bartlett *v.* Ball, 142 Mo. 28; Walker *v.* Deaver, 5 Mo. App. 139; Magee *v.* Young, 40 Miss. 164; Bates *v.* McDowell, 58 Miss. 815. *Contra*, Royston *v.* Royston, 21 Ga. 161; Moreau *v.* Detchmendy, 18 Mo. 522; Williams *v.* Courtney, 77 Mo. 587; Russell *v.* Rumsey, 35 Ill. 362; Steele *v.* Gellatly, 41 Ill. 39. See Dunn *v.* Sargent, 101 Mass. 336, 340. In Indiana, it has been held that dower may be increased, as well as diminished, in the lands owned by the husband at the time when the statute was enacted. Noel *v.* Ewing, 9 Ind. 37. A contrary conclusion has been reached in North Carolina. Sutton *v.* Asken, 66 N. C. 172 (8 Am. Rep. 500); Hunting *v.* Johnson, 66 N. C. 189; Jenkins *v.* Jenkins, 82 N. C. 202; O'Kelly *v.* Williams, 74 N. C. 281.

statute, after the property had been acquired. It is unquestionably the prevailing rule of construction, that the widow's dower right in the lands, which her husband has conveyed away during his lifetime, is governed by the law in force at the time of alienation. But since the dower right in all cases is inchoate during the coverture, even in the lands which have been aliened by the husband, it is in this case as much subject to legislative change, as long as it is not enlarged, as if the property was still in the possession of the husband. And while the presumption of law may be against the application of statute, regulating dower, to estates which have already been conveyed away, there is no constitutional objection in the way of its application to such cases, if the intention of the legislature is clearly manifested. It is true, as Mr. Cooley states: [1] that if the dower is diminished, the purchaser will get a more valuable estate for which he had not paid an equivalent consideration. But if it is the wish of the legislature that this shall be done, no provision of the constitution has been violated, for there has been no infringement of vested rights. This proposition was carried to such a logical extreme in Indiana, that, in declaring a statute, abolishing the common-law dower, and giving the wife an estate in fee in one-third of her husband's land in lieu of dower, to apply to the lands granted by the husband to purchasers for value, it was held that her common-law dower in such lands was abolished by the statute; while she could not claim the enlarged dower in such lands, because the statute would then interfere with the vested rights of the purchaser. Thus, she was deprived of both the statutory dower, and the dower at common law.[2] It may be doubted whether, in such a case, the legislature

[1] Cooley Const. Lim. 442, n. 4.

[2] Strong *v.* Clem, 12 Ind. 37; Logan *v.* Walton, 12 Ind. 639; Bowen *v.* Preston, 48 Ind. 367; Taylor *v.* Sample, 51 Ind. 423. See Davis *v.* O'Farrall, 4 Greene, 168; O'Farrall *v.* Simplot, 4 Iowa, 381; Moore *v.* Kent, 37 Iowa, 20; Craven *v.* Winter, 38 Iowa, 471; Kennedy *v.* Insurance Co., 11 Mo. 204.

intended that the statute should operate in that manner; but if the intention to have the statute apply to such cases is established, judged by the principles of constitutional construction previously deduced, there can be no doubt that the statute can be made to apply to such cases, even when its application will have the effect of depriving the widow of her dower, at common law, without succeeding in vesting in her the greater estate, intended by the statute to take the place of the dower at common law. But a statute, which simply provided for the enlargement of the dower at common law into an estate in fee could not be construed, when applied to estates that have been granted away, so as to deprive the wife of her common-law dower; for the dower at common law would be abolished inferentially from the enlargement of the estate by the operation of the statute; and since the statute cannot apply to such cases, because it would infringe upon the vested rights of the purchaser, the wife's dower in the lands of the husband's purchaser would remain unchanged at common law. It is probable that the Indiana court was in error in not placing this construction upon the statute in question.

In all of the Western States, the public domain, either of the United States or of the respective States, is offered for sale and settlement, under general statutes, containing more or less minute provision for its survey, location, and the issue of certificates of purchase and of patents. Until an intending purchaser has had the land, which he has selected for his purchase, surveyed and located, and has received his certificate of purchase, he has acquired no vested rights in the lands; and a law which withdraws from sale the lands which he has selected, would, under these circumstances, constitute no interference with vested rights.[1]

[1] Looney *v.* Bagley (Tex.), 7 S. W. 360; State *v.* Cunningham, 88 Wis. 81.

But every future interest in property is not an interest in expectancy. A vested estate of future enjoyment is as much a vested right as an estate in possession.[1] Vested remainders and reversions are, therefore, vested rights, and cannot be changed or abolished by statute. We have already discussed the character of a remainder or reversion after an estate tail, and have concluded that they are vested rights, not subject to legislative change or modification.[2] If the remainder or reversionary interest were contingent, the conclusion would possibly be different.[3]

But is a contingent remainder, a contingent use or a conditional limitation,[4] so far an interest in expectancy, that it may be defeated by subsequent legislation? In those cases in which the interest is contingent, because the person who is to take the contingent estate is not yet born, it may be reasonable enough to claim that the interest is not a vested right. Until one is born, or at least conceived, he cannot be considered as the subject of rights under the law. He certainly cannot have a vested right in or to anything. A statute might very properly destroy such a contingent interest. This class of cases may possibly include also those, in which the contingency arises from an uncertainty as to which of two or more living persons shall be entitled to take, as where the limitation is to the heirs of a living person. No man's heirs can be ascertained until his death, although one may be the presumptive or apparent heir of another. The heir presumptive or apparent cannot be said to have a vested right to such an estate, in the sense in which the term "vested right" is employed in the law of real property; but the same may be

[1] Cooley Const. Lim. 440. See *ante*, § 134.

[2] See *ante*, § 134.

[3] See to that effect, Varble *v.* Phillips (Ky.), 20 S. W. 306.

[4] The term "conditional limitation" is here employed as a general term, including shifting uses and executory devises. See Tiedeman on Real Prop., §§ 281, 398, 418, 536, 537.

said of any contingent interest, whether it be a remainder, a use, or a conditional limitation. The person, who is to take the estate upon the happening of the contingency, can in none of these cases claim to have a vested estate in the land; but may not the expectant owner of the contingent interest claim to have a vested, indefeasible right to the estate, whenever the contingency happens? Even in the law of real property, where the term "vested estate" is used in an extremely technical sense, the contingent remainderman, as well as the expectant owner of a shifting use or executory devise, is deemed to be so far possessed of vested rights in the estate as to be able, at least in equity, to make a valid assignment of the interest.[1] It would seem, therefore, that the interest in such cases would be so far a vested right that it would be beyond the reach of legislative interference. Another reason may be assigned why a statute could not operate to destroy such contingent interests, viz.: that, being created by act of the owner of the property instead of arising by operation of law, its subsequent taking effect in possession does not depend upon the continuance of the present laws. A change in the law can only operate to defeat the contingent estate, by imposing upon the owner a prohibition against doing with the estate what he could do without the aid of law. In all the common examples of interests in expectancy, which have been changed or abolished by statute, the interest is the creature of positive law, and does not vest upon any act of disposition of the owner of the land. Its taking effect in possession must consequently depend upon the continued existence of the law, which authorizes and creates it. The repeal of the law, before it vests, does not operate retrospectively, in defeating the inchoate estate. But a law would most certainly operate retrospectively, making that unlawful or impossible which was possible and lawful when it was done, which

[1] Tiedeman on Real Prop., §§ 411, 530.

changes or destroys the interest of a contingent remainderman, or executory devisee. Being retrospective, it will be void if it infringes any vested right, even though it does not amount to a "vested estate," as the term is understood in the law of real property. It has been held recently by the Supreme Court of South Carolina, that a statute, which prohibits the destruction of contingent remainders and uses by the employment of the common law feoffment and livery of seisin was not void, as interfering with any vested right, if the statute operated to protect from destruction the continued estates which were in existence at the time that the statute was enacted.[1]

Another interesting question is, how far powers of appointment may be changed or abolished by statute. A law would act retrospectively, if it were made to avoid the deed or grant of a power of appointment, and, if it interfered with vested rights, would be unconstitutional. A special power of appointment to appoint the estate to certain persons, under certain conditions and in accordance with directions given, would give to these beneficiaries a vested right to the exercise of the power in their favor, within the restrictions and limitations imposed by the donor; and the donee of the power cannot suspend or extinguish the power by a release.[2] It would be reasonable to claim that no statute could be so framed as to change or destroy such a power, because it would interfere with vested rights. But where the power was general, the donee having the power to appoint to whom he pleases, there is certainly no vested right to the exercise of the power in the person or persons to whom he might ultimately appoint the estate. But he would have an absolute right to the exercise of the power, either for himself or in trust for others; and this vested right would be violated by a statute, which either took away the power, or imposed upon its exer-

[1] People's Loan & Exchange Bank v. Garlington, 54 S. C. 413.
[2] Tiedeman on Real Prop., § 561.

cise limitations that did not exist at the time when the power was created, and which have the effect of materially reducing the value of the power. Such a statute would consequently be unconstitutional and void.

§ 136. **Limitation of the right of acquisition.** — One of the incidental rights of private property in lands is the right to acquire land. Land being the free gift of nature, the regulation of it by the government must be directed in the interest of all, and as everyone is guaranteed by the constitution the equal protection of the law, and inequality or partiality in the bestowal of privileges is prohibited, everyone may be said to have an indefeasible right to acquire land, by complying with the general laws, which have been enacted for regulating its disposition. As long as there is a public domain, everyone has a right to buy of the government, if he pays the price asked for the land. But where all the public lands have been taken up, the only way left open for the subsequent acquisition of land is by purchase from other private owners. If no one is willing to sell, one's right to acquire lands has in no way been violated. But if a seller can be found, any law which would interfere with the purchase, that is, prohibit a particular person or class of persons from acquiring any property in land whatever, would be an unconstitutional violation of a right which belongs to every citizen. Thus an ordinance was held to be unconstitutional by the Supreme Court of Texas, which absolutely prohibited any prostitute or lewd woman from residing in, or inhabiting any room, house, or place in the city, and forbade the leasing of any such premises to such a person.[1] Even a chronic breaker of the laws has a right to possess a lodging-house. He has no right to purchase or lease a house for the purpose of prosecuting his criminal or nefarious trade ; but even though

[1] Milliken *v.* City Council, 54 Texas, 388 (38 Am. Rep. 629).

it is a moral certainty that the criminal will use the house or room he occupies for immoral or criminal purposes, he can not be deprived of the use of said room or house as a lodging-house. The citizen has a constitutional right to acquire a local habitation, and no law can impose an absolute prohibition.

It is true that if the Christian principle of the universal brotherhood of man were recognized as a principle of constitutional and international law, and nations merely considered as convenient and subordinate subdivisions of this world-wide brotherhood, we would accord to the alien, as well as to the citizen, the equal right to acquire a homestead within our borders. But this principle of Christianity has never been adopted into our law, or into the law of any nation, civilized or uncivilized. On the contrary, international law is constructed on the idea of nationality as a cornerstone. The nations of the world are recognized by international law as distinct and independent political entities, having exclusive control over the country and people within their borders, and owing nothing to the people living outside of their jurisdictions. Although an alien born is entitled to the equal protection of the laws, instituted for the benefit of the citizen, while he is sojourning in the country, he has no absolute right to come into our country or to remain there. Unlike the citizen, he can at any moment be compelled to leave,[1] with or without cause, unless he has acquired a right of ingress under a treaty with his own government. The alien, therefore, cannot be considered as having any absolute right to purchase or acquire lands.

It has long been the policy of England and of the States of this country to deny to the alien the right to hold lands within their borders. In many of the Western States, statutes have been passed granting to the alien the unlim-

[1] See *ante*, § 57.

ited right to purchase and hold lands, and many millions of acres are now the property of foreign capitalists, who have never lived in this country and never expect to.

But while an absolute prohibition against the acquisition of lands by a particular person or class of persons would be unconstitutional, it would not be impossible to impose limitations upon the quantity of land which any one person may own. The agrarian evil, known under the name of "landlordism," resulting from the concentration of lands into the hands of a relative few, and the formation of large farms, is one that will threaten every community at some stage of its political existence. It may be considered by some, with some show of reason, to be questionable, whether the situation would be improved by a statute, which prohibited any one person from holding more than a given quantity of land; but no serious constitutional objection can be raised to such legislation. It would certainly be a constitutional exercise of police power, as long as it was not made to operate against vested rights, by making void the purchase of lands that have already been completed.[1] In New York there is a constitutional prohibition of agricultural leases for a longer period than twelve years.[2] Applied to future purchasers, although it provides for the confiscation without compensation of the lands acquired in excess of the quantity allowed by law, the law would most unquestionably be constitutional.

When it is said that the citizen has a natural right to acquire a certain quantity of land for lawful purposes, domestic corporations are not included under that term. It is probably true that corporations already created with the power to purchase lands, whose charters are not subject to repeal by the legislature, have as indefeasible a right to purchase lands as the natural person; but statutes of mort-

[1] As to the right of expropriation, see *post*, § 141.

[2] Clark *v.* Barnes, 70 N. Y. 301 (32 Am. Rep. 306).

main may, subject to this exception, be passed, prohibiting absolutely the acquisition of lands by corporations. The rights and powers of a corporation depend altogether upon the will of the legislature.

§ 137. **Regulation of the right of alienation.** — It can hardly be questioned that the government, in making sale of public lands, may provide that the interest which is thus granted shall not be assigned. For land being the absolute property of the State, any condition may be imposed in the original grant of it, that the welfare of the community may seem to require. If effective measures for the prevention of the concentration of lands in the hands of a few are considered essential to the prosperity of the State, the government may lawfully impose an absolute prohibition against alienation, for the purpose of attaining that end.

But in no State is there any law depriving the owner of lands of the right of alienation (except that in some of the States, statutes have been enacted which declare estates for years of short duration, and tenancies from year to year, to be alienable without the consent of the landlord); nor did the common law at any time prohibit alienation altogether. Under the feudal system, absolute alienation, of a kind which would shift to the shoulders of the alienee the burden of performing the duties which the feudal tenure imposed upon the tenant, was prohibited; but it was always possible to sublet the land to another, while the original tenant remained liable to the lord for the rendition of the services due to him.[1] On the contrary, the history of the law of real property reveals a constant struggle on the part of the common classes, to remove all restrictions upon the alienation of lands. The statute *quia emptores*,[2] declared

[1] Tiedeman on Real Prop., §§ 21, 23.

[2] 18 Edw. I.

void all conditions which absolutely prohibited the alienation of estates in fee, permitting grantors to impose limitations upon the power of alienation in the grant of any estate less than a fee. So, also, when the courts, by judicial legislation, developed the law of uses and executory devises, the rule against perpetuity was adopted, which prohibited the suspension of alienation by the creation of contingent estates, beyond a life or lives in being, and twenty-one years thereafter.[1] The same limitation rests in effect upon the creation of contingent remainders.[2] A constant change of ownership, or the possibility of such a change, has always been considered salutary to the public welfare.

Inasmuch, therefore, as the private property in land, already acquired, has been procured subject to no condition against alienation, the right of alienation is as much a vested right as the right of possession or the right of enjoyment; and a law which materially diminishes this right of alienation, without having for its object the prevention of injuries to others, or which takes away the right altogether, is an unconstitutional interference with vested rights. That the right of free alienation is a vested right, which cannot be modified or taken away by subsequent legislation, while the land remains in the possession of the present landholders, cannot be questioned; and it is equally certain that the government may, in its future grant of the public lands to private individuals, absolutely prohibit the alienation of these lands without the consent of the State: but it is exceedingly doubtful, whether it is constitutional or unconstitutional to apply the statutory prohibition to lands, already the property of private persons, after they have been sold to others, subject to the statutory restriction upon alienation. There is certainly no interfer-

[1] Tiedeman on Real Prop., § 544; 2 Washb. on Real Prop., 580.
[2] Tiedeman on Real Prop., § 417; 2 Washb. on Real Prop. 701, 702.

ence with any vested right of the subsequent purchaser, but there may be some ground for the claim that the operation of the statute would diminish materially the chances of sale and consequently would infringe upon the vested right of alienation of the present owners, in a manner not permitted under constitutional limitations. But this position does not seem to be tenable. While the vested right of alienation cannot by subsequent legislation be taken away altogether, an indirect restriction upon the right, resulting from the denial of the right of alienation to subsequent purchasers and the consequent diminution of sales, would not be properly considered a deprivation of a vested right. It is no more so than the effect of a statute, which prohibited the purchase by one person of more than a specified quantity of land. In both cases, the exercise of police power is reasonable, and the indirect burden imposed upon present owners is but what may be expected from the exercise of the ordinary police power of the State.

While the vested right of alienation cannot be taken away altogether, its exercise may be subjected to reasonable regulations, which are designed to prevent the practice of fraud, and to facilitate the investigation of titles. The statutory regulation of conveyancing is in some of the States very extensive, providing for almost every contingency; while in others the legislation has been limited. But in all the States it will be found to be necessary, in order to effect a valid transfer, to comply with certain statutory requirements. It is not necessary to speak of them in detail. They all have the same general object in view, and their constitutionality has never been and cannot be questioned. These requirements do not deprive the land owner of his right of alienation. They only regulate his exercise of the right, with reasonable objects in view. But it is hardly necessary to state that such statutory regulations can only have a lawful application to future conveyances. Laws for

the conveyance of estates are unconstitutional, as far as they affect conveyances already made.[1]

The various and, in this country, universal registration laws, which require a deed to be recorded in the public record books of the county, in which the land lies, are apt illustrations of the power of the State to regulate, while they cannot take away, the right to transfer the title to lands. So far as I know, the power of the State to require registration of a deed of conveyance, in order that it be valid and operative against subsequent purchasers, has never been questioned.

The so-called Torrens registration law has been declared to be unconstitutional by the courts of Illinois and Ohio; the Illinois statute being objectionable because the law provided for the determination by the registrar of the disputed claims of title; and this feature of the law was alone held to be unconstitutional, because it involved an unwarrantable encroachment by an administrative officer upon the power of the judiciary.[2]

When the original Illinois act was declared unconstitutional, for the reason just stated, the act was amended by the legislature so as to provide for initial proceedings in chancery; and left it optional with each county to determine whether it should adopt the new system of registration. Cook County, in which the city of Chicago is situated, adopted it, and the Supreme Court of Illinois declared the act, as amended, to be constitutional.[3] In Ohio, the Torrens system was adopted, making the initial proceeding for settling disputed claims of title an action *in personam*, without providing for personal service, for which reason the act was declared to be unconstitutional.[4] Massachusetts adopted the

[1] Greenough *v.* Greenough, 11 Pa. St. 489; Reiser *v.* Tell Association, 39 Pa. St. 137; James *v.* Rowland, 42 Md. 462.

[2] People *v.* Chase, 165 Ill. 527.

[3] People *v.* Simon, 176 Ill. 165.

[4] State *v.* Guilbert, 56 Ohio St. 575.

system next; and, to avoid the constitutional requirement of personal service upon all parties claimant, the statute provided for an action *in rem* before a Court of Registration which was specially created to entertain such suits. The act has been recently sustained in an able opinion by Chief Justice Holmes.[1]

A Michigan statute requires, as a condition precedent to the registration of a deed, that the party offering it must present along with it a certificate from the auditor general or county treasurer, declaring that the taxes for the five preceding years have been paid, and setting forth all tax liens and titles which may be held against the land conveyed. The constitutionality of the statute was attacked unsuccessfully.[2]

§ 137*a*. **The right of testamentary alienation and intestate succession — Taxation of inheritances.** — But the vested right of alienation, which the land owner acquires as a natural incident of his property, rests upon the natural power, in the absence of lawful restrictions, to give away or sell what belongs to him. The natural right can only exist as long as his natural dominion over the property lasts, viz.: during his life. His natural dominion over his property terminates with his death. He may sell or give away, as he pleases, as long as he does not violate the rights of creditors, up to the last moment of his life, and his right of alienation *inter vivos* cannot be taken away by statute; but after death he ceases to exercise a natural dominion over his property, and if he has any power of disposition after death, it must rest upon positive law, and must change or disappear with the modification or repeal of the law. It is therefore held that no one has a vested right to dispose of lands by will, in accordance with the laws in force when he acquired them. His right to devise

[1] Tyler *v.* Court of Registration (Mass. 1900), 55 N. E. 812.

[2] Van Husen *v.* Heames, 96 Mich. 504.

depends upon the laws in existence at his death. The new statute may be made to apply to future purchasers of lands, and not to present owners, but it will apply to the latter, if they are not expressly excluded from the operation of the statute.[1]

It has recently been declared by the Supreme Court of Illinois that there is no constitutional limitation of the power of the State to change the law of descent as to alien heirs, except so far as the rights of such heirs to American inheritances have been safe-guarded by treaty between their home governments and the United States.[2]

If it be an accepted doctrine of American constitutional law that there is no natural and inalienable right in any one, either to dispose of his own property by will, or to take property from another by inheritance, then it matters not how far a legislature may depart from natural instinct in ignoring or restricting the moral claims of near relatives to the inheritance of the property of the deceased owner, the constitution cannot be successfully appealed to for protection. The right of succession to the estate of a dead man, even though he be one's father, is a privilege resting upon positive law, which cannot be demanded as a constitutional right, and which the legislature may regulate or take away altogether in the exercise of its wise or unwise discretion. Of course, unless public opinion

[1] "A party who acquires property does not acquire with it the right to devise such property according to the law as it exists at the time he acquires it. Wills and testaments, rights of inheritance and succession, are all of them creatures of the civil or municipal law, and the law relating to or regulating any of them may be changed at the will of the legislature. But no change in the law made after the death of the testator or intestate will affect rights which became vested in the devisee, heir or representative by such death." Sturgis *v.* Ewing, 18 Ill. 176. See Emmert *v.* Hays, 89 Ill. 11. Hughes *v.* Murdock, 45 La. Ann. 935; Vna Aken *v.* Clark, 82 Iowa, 256. See *post*, § 165, where the subject is again mentioned in connection with the discussion of the police regulation of personal property.

[2] Wunderle *v.* Wunderle, 144 Ill. 40.

should adopt the principles of communism, which is extremely improbable, there is no likelihood of any fundamental change in the underlying principle of the laws of succession. So far as it is possible for one to see into the future, the total abolition of the right of inheritance will never be seriously proposed to the legislature of a civilized State. There is but one likely method of curtailing or restricting the enjoyment of this privilege; and that is by the heavy increase in the taxation of inheritances.

The effort has been made in a great number of cases to prove the unconstitutionality of these inheritance tax laws, by holding that, being taxation, the tax must be so imposed as to satisfy the constitutional requirement of equality and uniformity. As is well known, all American constitutions contain the requirement that taxation shall be equal and uniform.

Where the taxation of inheritances is based upon a uniform rate per centum of the assessed value of the estate of the decedent; and all estates are taxed at the same rate, whether the estate be large or small, or the beneficiaries be closely or remotely related to the decedent, or not related at all, it does not much matter whether you consider the inheritance or succession tax as a tax in the constitutional sense, which is required to be equal and uniform, or as a regulation of the right or privilege of inheritance. In either case the tax is valid and does not conflict with any constitutional principle. For, as Mr. Justice Earl said in In re McPherson,[1] "as long as the tax is equal and uniform the State has the undoubted power to tax anything that has value; property of all kinds, franchises of corporations and individuals, businesses and contracts of all kinds, the right of suffrage, and all other rights and privileges, it matters not what their nature may be; the sole restriction being, that there must be equality and uniformity

[1] 104 N. Y. 318.

in the imposition of the particular tax upon all who come within that particular classification."

But where the inheritance or succession tax is levied upon estates of a certain value and over, and others of less value are exempted, or where a higher rate per centum is levied upon the same amount of property, when the beneficiaries are collateral heirs or strangers, than when they are direct heirs, it would seem to be an irresistible conclusion that such a tax upon inheritances, if it be properly considered as a tax in the constitutional sense, is unconstitutional, because it does not comply with the constitutional requirement of equality and uniformity, as that constitutional provision is generally construed. And we should not be surprised to learn that such an inheritance tax has been declared to be unconstitutional. With equal or greater force could the constitutional objection be applied to a progressive inheritance tax, the rate per centum varying according to the value of the inheritance. In Curry *v.* Spencer,[1] the New Hampshire inheritance tax law was declared to be unconstitutional, because the tax was imposed upon collateral relatives and not upon direct heirs. The court said: "It is plainly founded upon pure inequality, and is simply extortion in the name of taxation; and it can, therefore, never be maintained in this jurisdiction so long as equality and justice continue to be the basis of constitutional taxation."

The Ohio statute provided for the exemption of estates under $2,000 and an increase of the per centum of the tax as the value of the estate increased. The act was declared to be in violation of the constitutional requirement of equality, and, therefore, void. Said the court: "This statute fails to protect equally the people who exercise the right and privilege of receiving or succeeding to property. * * * The exemption must be equally for all, and the

[1] 61 N. H. 624.

rate per cent must be the same on all estates. There can be no discrimination in favor of rich or poor. All stand on an equality under the provisions of the constitution, and it is this equality that is the pride and safeguard of us all. * * * The State finds no warrant in its constitution for saying that it will make a greater rate of charge for the privilege of succeeding to large estates than to smaller ones, but on the contrary this is expressly prohibited by the requirement that laws shall be for the equal protection and benefit of the people."[1] But in a later case[2] the same court held that discrimination between kindred of different degrees of relationship in the imposition of an inheritance tax was not unconstitutional. The court said: "Since the right to receive property by inheritance is not guaranteed by the constitution, it prescribes no limitation upon the power of the general assembly to designate the persons who may thus receive. The discrimination is based upon and justified by the fact that there are degrees in collateral kinship."

In Minnesota, the tax upon inheritances was given the form of progressive probate fees; all estates under $2,000 being exempt, and in other cases the fees were arbitrarily graduated according to the inventoried value of the estate. The act was declared to be unconstitutional, because it imposed an unequal tax and established the principle of a sale of justice, which is not countenanced by the constitution.[3]

The New Hampshire case is probably the only case which can be properly considered as being squarely in opposition to the constitutionality of a progressive or discriminating inheritance tax. The two Ohio cases neutralize each other and leave the question to be ultimately settled by a third decision. The Minnesota law is clearly

[1] State *v.* Ferris, 53 Ohio St. 314, 336.

[2] Hagerty *v.* State, 55 Ohio St. 613.

[3] State *v.* Gorman, 40 Minn. 232.

unconstitutional, as it provides for the imposition of a tax upon the estate and not upon the right of succession.

The overwhelming judicial opinion in this country does not consider the inheritance tax as a tax in the constitutional sense, which is required to be levied equally upon all persons, whether they are nearly or remotely related to the deceased; and at the same rate per centum, whether the inheritance be large or small. The inheritance tax is held to be only a curtailment of a statutory privilege or franchise; or, as the Supreme Court of Pennsylvania expressed it, "as a bonus, exacted from the collateral kindred and others, as the condition on which they may be admitted to take the estate left by a deceased relative or testator." [1] In the case of In re McPherson [2] Mr. Justice Earl in delivering the opinion of the court, held it to be unnecessary to decide whether the tax was a tax upon property or upon the succession or transfer of an inheritance to the heirs and beneficiaries. But in a number of succeeding cases, the New York Court of Appeals have decisively held the tax to be imposed upon the succession or transfer and not upon the property of the decedent's estate.[3] In the Hamilton case, the court said: "The statute does not provide for a tax upon property in the sense that such enactments are generally understood, but upon the right of succession under a will, or in case of intestacy. The right of succession to property upon the death of the owner rests upon some positive law, and it is competent for the law-making power, when conferring the right to annex to it such burdens or conditions as the public interest may require. Hence the statute has provided that certain beneficiaries

[1] Strode v. Commonwealth, 52 Pa. St. 182.

[2] 104 N. Y. 318.

[3] Matter of Swift, 137 N. Y. 77; Matter of Merriam, 141 N. Y. 479, 485; Matter of Curtis, 142 N. Y. 219, 223; Matter of Hoffman, 143 N. Y. 327, 330; Matter of Hamilton, 148 N. Y. 313; Matter of Bronson, 150 N. Y. 1, 6, 16.

under a will, and certain of the next of kin in case of intestacy, shall take subject to certain deductions from the bequest or distributive share, which is to be paid into the public treasury for the public use, and for convenience it is called a tax."

In California in a recent case[1] where certain small estates, and the property which goes to certain near relatives mentioned in the statute, are exempted from the payment of the tax, the court held the tax to be a burden or condition imposed upon the right of succession, and only a regulation of the descent of property. It, therefore, did not come within the constitutional requirement that property shall be taxed according to its value. The same conclusion was reached by the Supreme Courts of Colorado, Montana and Illinois, in which States the statutes provided for the progressive taxation of inheritances, as well as for the discrimination in the rate against collateral kindred and stranger beneficiaries.[2] The Illinois court said: "The laws of descent and devise being the creation of the statute law, the power which creates may regulate and may impose conditions or burdens upon a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the State then provides for by the law of descent or devise. The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto." The court further stated that the only constitutional requirement which need be observed in the levying of a tax upon inheritance is that it must be levied uniformly and equally upon all individuals who come within a particular class of heirs and beneficiaries, whether the classification be according to the value of the inheritance or according to degrees of relationship, or according to both. The constitution-

[1] In re Wilmerding's Estate, 117 Cal. 281.

[2] In re House Bill No. 122, 23 Colo. 492; Gelsthorpe *v.* Furnell, 20 Mont. 299; Kochersperger *v.* Drake, 167 Ill. 122.

ality of the Illinois statute was attacked in the Supreme Court of the United States on the ground that it violated the Federal constitutional requirement of the equal protection of the laws. The court sustained the statute, and held the progressive features to be reasonable classifications of the right of succession, although Mr. Justice McKenna intimated that some classification might be made in the imposition of the inheritance tax, which might be unreasonable and deny to persons the equal protection of the laws.[1] Mr. Justice McKenna quoted with approval from an opinion of Chief Justice Taney, in Mager *v.* Grimes,[2] sustaining the constitutionality of a statute in Louisiana, which imposed a tax of ten per cent upon legacies, when the legatee was neither a citizen nor a resident of the United States. Chief Justice Taney said: "Now the law in question is nothing more than an exercise of the power, which every State and sovereignty possesses, of regulating the manner and terms upon which property, real and personal, within its dominion may be transmitted by last will and testament or by inheritance; and of prescribing who shall, and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interest or policy."

The judicial expression, which best confirms the practical soundness of this philosophical exposition of the limit-

[1] Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283.

[2] 8 How. 490, 493.

ations of the natural right of property, is to be found in the opinion of Mr. Justice Brown, in United States *v.* Perkins,[1] in which the New York Inheritance Tax Law was sustained. Mr. Justice Brown said: "While the laws of all civilized States recognize in every citizen the absolute right to his own earnings and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of property by will has always been considered purely a creature of statute and within legislative control. * * * Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to the public good."

The conclusion, therefore, is that all State laws, providing for the taxation of the right of succession to the estate of a decedent, are constitutional, it matters not how wide a departure there may be in the imposition of the tax from the constitutional requirement of uniformity and equality in the levy of taxes in general. But it seems to me very clear that, in order that the inheritance tax may be treated as a tax upon the succession instead of an ordinary tax upon the property of the decedent, the law imposing it should make such intention plain by directly imposing the tax upon the beneficiaries instead of upon the decedent's estate. Two courts, the Supreme Courts of Wisconsin and Missouri, have held the inheritance tax laws of their respective States to be unconstitutional, because, being laid upon the estate of the decedent in the aggregate, it could be construed only as an ordinary tax upon the prop-

[1] 163 U. S. 625. 627.

erty of the decedent, and must accordingly be so imposed as not to offend the constitutional requirements that taxation must be equal and uniform, and must be levied only for public purposes.[1] In the Missouri case the court said: "The controlling question is, upon what did it authorize that tax to be levied — upon the property of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter it is settled by the great weight of authority that it does not fall within the regular ordinary taxation upon property which our constitution requires shall be in proportion to value. * * * When it is clear that the tax is upon the succession, it is computed, not upon the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests into which it is divided by the will, or by the statute laws of the State, and is a charge against each share or interest according to its value, and against the person entitled thereto." Mr. Justice Finch accentuates the necessity of observing this distinction in the phraseology of the statute, in matter of Hoffman.[2]

During the past year, Congress, as a part of its war revenue bill, has levied a progressive tax upon inheritances. If a progressive tax upon property in general would offend the constitutional requirement of equality and uniformity, — and such would seem to be the invariable ruling of the courts wherever the attempt has been made to impose different rates of taxation upon different kinds of property — the Federal inheritance tax law is beyond all doubt unconstitutional. It certainly cannot be sustained as a condition to the acquisition of the title to property by inheritance or by will. For, in the division of governmental powers between the United States and the respective States,

[1] State *v.* Mann, 76 Wis. 469; State *v.* Switzler, 143 Mo. 287; State *v.* Rassieur, *id.*

[2] 143 N. Y. 327, 329.

the regulation of the titles to property is reserved to the respective State governments, and consequently cannot be interfered with by the United States government. The Federal inheritance tax, unlike the State inheritance tax, cannot be described, as the retention by the Federal government of a part of what that government may appropriate entirely for public use, but which it gives by positive laws to the heirs and legatees of the deceased owner. The Federal inheritance tax is a tax, in the constitutional sense, whether it be in terms imposed upon the property of the deceased owner, or upon the right of succession thereto; and, in the levy of the tax, the ordinary constitutional requirements of taxation must be observed, whatever those requirements are construed to be. It is possible that the United States may tax the transfer of inheritances, as it does the transfers of property *inter vivos*, by requiring revenue stamps to be attached to bills of sale and deeds of conveyance. But the failure of the individual to affix the stamp, or to pay the tax, does not affect his title to the property.

Another probable constitutional objection to the Federal inheritance tax is that it is a direct tax, which is prohibited by the Constitution of the United States, unless it be apportioned among the States according to population. It is true that a similar tax, which was imposed by the Federal government during the Civil War, was held by the Supreme Court of the United States not to be "a direct tax" in the constitutional sense.[1] But the same court, about the same time, held also that a Federal income tax was not a direct tax.[2] In the light of the recent decisions in the Income Tax cases,[3] it is quite reasonable to expect the Supreme Court of the United States to pronounce the present Fed-

[1] Scholey *v.* Rew, 23 Wall. 331.

[2] Springer *v.* United States, 102 U. S. 587.

[3] Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 427; *s. c.* 158 U. S. 608.

eral inheritance tax to be unconstitutional, because it is a direct tax; unless the patriotic motive of the tax may unconsciously control the minds of the court and reveal to them a good ground for distinguishing between an income tax and a tax upon inheritances in their classification of direct and indirect taxes.

While this book is going through the press, the Supreme Court of the United States has sustained the constitutionality of the national inheritance tax law.[1] The two points, which were made against the validity of the law in the preceding paragraph, were met and disposed of in the following manner: The court held that a tax upon inheritances was not a direct tax in the constitutional sense, sustaining the prior decision in Scholey *v.* Rew (*supra*), and ignoring the analogies to be drawn from their recent decision in the income tax cases. Indeed, the fact that Mr. Justice White, who delivers the opinion in the case, had filed a strong dissenting opinion in the income tax case, might justify the inference that the decision in the inheritance tax case shows some changes of judicial opinion as to what are properly held to be direct taxes.

The more important part of the opinion is that in which the justice declares that, although the tax upon inheritances is a tax in the constitutional sense, — as was contended in the preceding paragraph to be necessarily the case when such a law was enacted by Congress, — it need not be equal in rate as to all, to secure uniformity, as the requirement of uniformity in the national constitution had reference only to geographical uniformity; the clause of the constitution declaring that all duties, imposts and excises shall be "uniform throughout the United States."

[1] See Knowlton and Buffum, Executors *v.* Moore, Internal Revenue Collector (1900).

"Considering the text," he continued, "it is apparent that if the word 'uniform' means 'equal and uniform' in the sense now asserted by the opponents of the tax, the words 'throughout the United States' are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction, which requires that effect be given to each word of the constitution.

"One of the most satisfactory answers to the argument that the uniformity required by the constitution is the same as the equal and uniform clause which has since been embodied in so many of the State constitutions, results from a review of the practice under the constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts, and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced."

On another point of uniformity he said: "It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State.

"It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied."

On the general effect of holding that a progressive tax is not unconstitutional, the justice said: —

"As the whole amount of such personal property, as

aforesaid, relates to the sum of each legacy or distributive share considered separately, it follows that all legacies below $10,000 are not taxed and that those above that amount are taxed primarily by the degree of relationship or absence thereof specified in the five classifications contained in the statute and that the rate of tax is progressively increased by the amount of each separate legacy or distributive share. This being the correct interpretation of the statute, it follows that the court below erroneously maintained a contrary construction, and, therefore, the tax assessed and collected was for a larger amount than the sum actually due by law.

"The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So also some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation the question whether it is or is not is legislative and not judicial.

"The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious."

Mr. Justice Brewer dissented from the opinion of the court, holding that the constitutional requirement of uniformity was violated by the progressive feature of the tax.

§ 138. **Involuntary alienation.** — Except the power which the court of chancery possesses in certain cases, and which of course is subject to repeal or regulation by the legislature, the power to effect an involuntary alienation rests upon legislative enactment. As a general proposition, the legislature cannot divest one of his vested rights against his will. It can enact laws for the control of property and of its disposition, but it cannot take the private property of one man and give it to another.[1] But there are certain well-known exceptions to this general rule, where the interference of the legislature is necessary to save and protect the substantial interests of individuals on account of their own inability to do so, or to promote the public good. In some of the State constitutions there is a provision against the enactment of special laws, operating upon particular individuals or upon their property. In those States, therefore, involuntary alienation can only be effected by a general law, applicable to all persons under like circumstances. But in the absence of such a constitutional provision, the transfer of lands may be made by special acts of the legislature, as well as under a general law.[2] But wherever such a transfer by special act of the legislature would involve the assumption of judicial power, it would be generally held void, under the common con-

[1] Wilkinson *v.* Leland, 2 Pet. 658; Adams *v.* Palmer, 51 Me. 494; Commonwealth *v.* Alger, 7 Cush. 53; Varick *v.* Smith, 5 Paige, 159; Matter of Albany Street, 11 Wend. 149; John and Cherry Street, 19 Wend. 676; Taylor *v.* Porter, 4 Hill, 147; Heyward *v.* Mayor, 7 N. Y. 324; Bowman *v.* Middleton, 1 Bay, 252; Russell *v.* Rumsey, 35 Ill. 374; Good *v.* Zercher, 12 Ohio, 368; Deutzel *v.* Waldie, 30 Cal. 144.

[2] Sohier *v.* Mass. Gen. Hospital, 3 Cush. 483; Kibby *v.* Chitwood, 4 B. Mon. 95; Edwards *v.* Pope, 4 Ill. 473.

stitutional provision which denies to the legislature the exercise of such powers.[1]

One of the most important, and the most easily justified, cases of involuntary alienation, is one affecting the property of persons under legal disability. Where persons are under a legal disability which prevents them from making a valid sale of their property, and such sale and reinvestment of the proceeds of sale are necessary for the conservation of their interests, the State, in the capacity of *parens patriæ*, has the power to authorize a sale by the guardians of such persons. This may be done by special act or by a general law.[2] The law which imposes the disability may very properly provide against the injurious consequences of such disability.

But the property of persons who are not under a disability cannot be sold by authority of the courts, on the ground that such a sale would be beneficial.[3] In most of the States there are general laws authorizing the courts to empower the guardians of minors, lunatics, and other persons under disability to make sale of the real property of such persons.

The law also provides for sales of real property by the administrators and executors of the deceased owner. Where one dies without having made proper provision, for such contingencies, it is often necessary that some one should be authorized to make a sale of the lands for the purpose of making an effective administration,

[1] Rice *v.* Parkman, 16 Mass. 326; Jones *v.* Perry, 10 Yerg. 59; Lane *v.* Dorman, 4 Ill. 238; Edwards *v.* Pope, 4 Ill. 473.

[2] Sohier *v.* Mass. Gen. Hospital, 16 Mass. 326; *s. c.* 3 Cush. 483; Davidson *v.* Johonot, 7 Metc. 395; Cochran *v.* Van Surlay, 20 Wend. 365; Estep *v.* Hutchman, 14 Serg. & R. 435; Doe *v.* Douglass, 8 Blackf. 10; Kirby *v.* Chitwood, 4 B. Mon. 95; Shehan *v.* Barnett, 6 B. Mon. 594; Jones *v.* Perry, 10 Yerg. 59. See Willis *v.* Hodson, 79 Md. 327.

[3] Wilkinson *v.* Leland, 2 Pet. 658; Adams *v.* Palmer, 51 Me. 494; Sohier *v.* Mass. Gen. Hospital, 3 Cush. 483; Heyward *v.* Mayor, 7 N. Y. 324; Ervine's Appeal, 16 Pa. St. 256; Palairet's Appeal, 67 Pa. St. 479.

and to protect and satisfy the claims of those who are interested in the property. If the deceased leaves a will he very often, perhaps generally, empowers the executor to make sale of the land, when necessary. Where the executor has the testamentary power, his sales are presumed to be under this power, and there is no need of a resort to the statutory power.[1] But these express testamentary powers are supplemented by statutes, which authorize courts of probate to order a sale of the decedent's lands by the administrator or executor, whenever this is necessary to the full performance of his duties. Thus, if the personal property is not sufficient to satisfy all the debts, the administrator or executor may, under order of the court, make a valid sale of the lands, and the proceeds of sale will constitute in his hands a trust fund, out of which the claims of the creditors must be satisfied.[2]

A statute, which authorized administration upon the estate of one, who has not been heard from for seven years, as if he were dead, was held to be unconstitutional, because it deprived one of property without due process of law.[3]

By the early common law, lands were inalienable for any purpose, and consequently they could not be sold to pay the debts of the owner. But as trade and commerce increased, it became necessary that the creditors should be provided with means for satisfying their claims by compulsory process against the debtor's property. In compliance with the popular demand, the statutes merchant and statutes staple were passed, which created in favor of the creditors an estate in the debtor's land, whereby he was enabled to enter into possession and satisfy himself out of the rents and profits.[4] These statutes have been

[1] Payne *v.* Payne, 18 Cal. 291; White *v.* Moses, 21 Cal. 44.

[2] See Tiedeman on Real Prop., § 756; 3 Washb. on Real Prop. 209.

[3] Carr *v.* Brown, 20 R. I. 215.

[4] 2 Bla. Com. 161, 162.

abolished in England, where they are superseded by the *writ of elegit*, which bears a close resemblance to the American statutes of execution. In all the American States there are statutes which provide that, when a creditor obtains judgment against his debtor, he may cause a writ of execution to be issued against the property of the debtor, under which the sheriff is authorized to make sale of the real property, and to execute the proper deeds of conveyance. In order to further protect the creditor, it is provided by most of the State statutes that the judgment, when properly docketed, creates a lien upon all the debtor's real property, which attaches to, and binds, the land into whosesoever hands it may come. The judgment lien enables the creditor to sell the land under execution, although it has been conveyed away by the debtor to a purchaser for value. It is not necessary to attempt to justify these cases of involuntary alienation. When a judgment for debt is rendered, it determines that one man owes another so much property, expressed and estimated in money, and it is a very natural police regulation to give the property to whom it is due. But any statutory change in the law for sale and redemption of real estate, which is sold for the satisfaction of a judgment, can only apply to judgments which have been procured after the passage of the new law.[1]

The cases are numerous in which the court of chancery has the power to decree a sale and conveyance, and it will be impossible to enumerate them. The more common cases are the decree of sale in the foreclosure of a mortgage, in the enforcement of an equitable lien, in an action for specific performance of a contract for the sale of lands, in the confirmation of defective titles, and the sale of equitable estates to satisfy the claims of creditors. In all of these

[1] Greenwood *v.* Butler, 52 Kan. 424; Moore *v.* Barstow, 52 Kan. 431; Sheldon *v.* Pruessner, 52 Kan. 593.

cases, originally, the court in its decree ordered the holder of the legal title, or the owner of the land, to make the proper deeds of conveyance, upon pain of being punished for contempt of court. If the individual was obstinate or beyond the jurisdiction of the court, the court was powerless to effect a conveyance.[1] But now courts of equity generally possess the power to authorize some officer of the court, usually the master, to execute the necessary deeds of conveyance, and such deeds will be as effectual in passing an indefeasible title as the sheriff's deed under execution.[2]

Generally, when a title is defective through some informality in the execution of the conveyance, upon a proper case being made out, the court of equity will afford an ample remedy by decreeing a reformation of the instrument.[3] But cases do arise where, through the absence or death of the parties, or through a want of knowledge as to who they are, it is impossible to obtain a reformation in chancery; and even in cases where the equitable remedy is only troublesome and inconvenient, and the defect is only an informality, which does not go to the essence of the conveyance, and which does not create any doubt as to the intention to make a valid conveyance; the power of the legislature to interfere and cure the defect by special act has been generally sustained by the courts of those States, where special acts are not inhibited by the constitution.[4]

[1] Ryder *v.* Innerarity, 4 Stew. & P. 14; Mummy *v.* Johnston, 3 A. K. Marsh. 220; Sheppard *v.* Commissioners of Ross Co., 7 Ohio, 271.

[2] 3 Washb. on Real Prop. 219; Tiedeman on Real Prop., § 758.

[3] Adams *v.* Stevens, 49 Me. 362; Brown *v.* Lamphear, 35 Vt. 260; Andrews *v.* Spurr, 8 Allen, 416; Metcalf *v.* Putnam, 9 Allen, 97; Conedy *v.* Marcy, 13 Gray, 373; Prescott *v.* Hawkins, 16 N. H. 122; Caldwell *v.* Fulton, 31 Pa. St. 484; Keene's Appeal, 64 Pa. St. 274; Mills *v.* Lockwood, 42 Ill. 111; Gray *v.* Hornbeck, 31 Mo. 400.

[4] See Wilkinson *v.* Leland, 2 Pet. 627; *s. c.* 10 Pet. 294; Watson *v.* Mercer, 8 Pet. 88; Kearney *v.* Taylor, 15 How. 494; Adams *v.* Palmer, 51 Me. 494; Sohier *v.* Mass. Gen. Hospital, 3 Cush. 483; Chestnut *v.* Shane's Lessee, 16 Ohio, 599; Tiedeman on Real Prop., § 755; Lyman *v.* Gedney, 114 Ill. 388; Barrett *v.* Barrett, 120 N. C. 127; Pelt *v.* Payne (Ark.), 30

The compulsory partition of a joint estate, by allotment or by sale of the premises and distribution of the proceeds of sale, is another recognized class of involuntary alienations. The co-tenants of a joint estate may make a voluntary partition by mutual conveyance to each other of their share in different parts of the estate; that is, by dividing up the estate into several parcels, and making conveyance of one parcel to each, all joining in the deed or deeds, a partition can be made.[1] This was effected merely by the joint exercise of the right of alienation. The consent of all had to be obtained, for all had to join in the deed of partition. Involuntary partition is quite different. This gives one co-tenant the right to take away the property of another against his will, and compel him to accept in the place of it a different interest in the land, or his share in the proceeds of sale. At common law, no suit for partition of a joint estate could have been sustained against the will of any one of the co-tenants, except in the case of an estate in coparcenary; and it was not until the reign of Henry VIII. that any legal action was provided for compulsory partition. The distinction, made by the common law in this connection between estates in coparcenary and other joint estates, rests upon the fact that the estate in coparcenary arises by operation of law, by descent to the heirs, without the consent of the co-tenant. It was but reasonable that the common law should provide a means of converting the estate in coparcenary into estates in severalty. The other joint estates are created by and with the consent of the co-tenants, for they are always created by purchase, and they may be presumed to have intended that the estate should ever remain a joint estate, at least as long as all the co-tenants do not agree to a partition. But, yielding to the pressure of public opinion, which has always in England

S. W. 426; Zbranikov *v.* Burnett (Tex. Civ. App.), 31 S. W. 71. But see Willis *v.* Hodson, 79 Md. 327.

[1] Tiedeman on Real Prop., § 260; 1 Washb. on Real Prop. 676.

and in this country demanded the removal of all restrictions upon the free alienation of land, and the regulation of estates in land in such a manner that a change of ownership may take place in the easiest possible manner, statutes were passed in the reign of Henry VIII., and likewise in the different States of the Union, creating a legal action for the compulsory partition in all joint estates except estates in entirety.[1] The right of compulsory partition of all joint estates, as an invariable incident of these estates, except in the case of tenancies in entirety, has come down to us as an inheritance from the mother country, and all joint estates in the United States have been created in actual or implied contemplation of the possibility of a compulsory partition. Consequently, no question can arise as to the constitutionality of laws providing for compulsory partition. It would be different if the right of compulsory partition were granted now for the first time, and the statute was made to apply to existing joint estates. So far as it applied to existing joint estates, the law would be unconstitional, because of its interference with vested rights.[2] But all subsequently created joint estates would take effect subject to this provision for compulsory partition, and no one's rights could in such a case be violated.

No partition could be made of a tenancy in entirety; principally, because a man and his wife could not sue each other. The right of compulsory partition was therefore not an incident of tenancies in entirety.[3] It has been much mooted, whether tenancies in entirety were not by implication converted into tenancies in common by statutes, which in general terms give to married women in respect to their property, the rights and powers of single women. Although there are a few cases, in which

[1] Tiedeman on Real Prop., §§ 261, 262, 290; 1 Washb. on Real Prop. 651, 676; Williams on Real Prop. 103.

[2] See Richardson *v.* Monson, 23 Conn. 94.

[3] Tiedeman on Real Prop., § 242; 1 Washb. on Real Prop. 673.

the courts have held that tenancies in entirety were inferentially abolished,[1] the majority of the cases deny that these statutes have had any effect upon the law of estates in entirety; and that a conveyance of lands to a man and wife makes them tenants in entirety, with the common-law rights and incidents of such tenancies, now, as before the statute.[2] The right to the continued existence of the tenancy in entirety, except when it is destroyed by a voluntary partition, is a vested right which cannot be taken away by subsequent legislation. A statute, which gave to tenants in entirety the right of compulsory partition would be unconstitutional, so far as it was made to apply to existing tenancies in entirety.

The text finds support in one case from North Carolina, in which it was held that a law, which extended the power of partition to remaindermen, where there is an outstanding life-estate, could not affect the title of one who acquired his interest in the land prior to the passage of the act.[3] And in New York, an act was held to be unconstitutional, which provided, in the case of a petition where there were unknown heirs, that after the lapse of twenty-five years, the property may be sold, and the shares of the known heirs be distributed between them.[4]

In a Pennsylvania case,[5] a law was sustained, which authorized the sale of trust property by decree of court, at the solicitation of some of the beneficiaries, notwith-

[1] Clark *v.* Clark, 56 N. H. 105; Cooper *v.* Cooper, 76 Ill. 57; Hoffman *v.* Steigers, 28 Iowa, 302.

[2] Marburg *v.* Cole, 49 Md. 402 (33 Am. Rep. 266); Hulett *v.* Inlow, 57 Ind. 412 (26 Am. Rep. 64); Hemingway *v.* Scales, 42 Miss 1 (2 Am. Rep. 586); McCurdy *v.* Canning, 64 Pa. St. 39; Diver *v.* Diver, 56 Pa. St. 106; Bennett *v.* Child, 19 Wis. 365; Fisher *v.* Provin, 25 Mich. 347; Grover *v.* Jones, 52 Mo. 68; Robinson *v.* Eagle, 29 Ark. 202; Goelett *v.* Gori, 31 Barb. 314; Meeker *v.* Wright, 75 N. Y. 262.

[3] Gillespie *v.* Allison, 115 N. C. 542.

[4] People *v.* Ryder, 65 Hun, 175.

[5] In re Freeman's Estate (Pa.), 37 A. 591.

standing the unreasonable objection of others. But where a deed of trust expressly prescribes the mode of sale of such property, a subsequent statute cannot establish other requirements, or direct any other mode of sale, without interfering with vested rights or impairing the obligation of a contract, as the case may be.[1]

A statute of Kentucky[2] authorized the sale of real estate in fee, upon the petition of the life tenant, with or without the consent of the tenant in remainder or reversion. The object of the statute was the same which prompted the grant of the right of compulsory partition, viz.: to facilitate the change of ownership in lands. The statute was declared to be unconstitutional, except in its application to cases in which the reversioner or remainder-man is laboring under some disability, such as infancy, insanity, or the like. It was claimed that in no other case could a citizen be deprived of the right to manage his property by State interference.[3] There cannot be any doubt of the unconstitutionality of the law when it is applied to existing life estates, remainders and reversions, although such laws have been sustained in Massachusetts and Connecticut.[4] The application of the statute to such

[1] International Building and Loan Assn. *v.* Hardy, 86 Tex. 610. See Brown *v.* Challis, 23 Colo. 145, as to the prospective operation of all statutory changes in the law of partition.

[2] Civil Code, § 491.

[3] Glossom *v.* McFerran, 79 Ky. 236. But see Varble *v.* Phillips (Ky.), 20 S. W. 306, where such an act was sustained in the case of contingent remainders. See, also, Gillespie *v.* Allison, 115 N. C. 542.

[4] Statute authorized sale of lands on petition of life tenant: —

"It is said by the petitioners that this resolution deprives them of their interest in the property against their will and is therefore void, not only as opposed to natural justice, but as in conflict with the provisions of the constitution of the State. It was held by this court in the case of Richardson *v.* Monson, 23 Conn. 94, that the statute which authorizes the sale of lands held in joint tenancy, tenancy in common, or coparcenary, whenever partition cannot conveniently be made in any other way, is constitutional. That case was ably discussed by counsel, who offered some arguments against the constitutionality of the statute,

cases would operate to deprive persons of their vested rights, and consequently would be unconstitutional. But in its application to future cases, the statute violates no provisions of the constitution, for like the statutory right of compulsory partition, it would attach as an ordinary incident to all subsequently created estates for life, and in remainder or reversion: no vested right would be invaded, for the vested rights of those who would be affected by the compulsory sale, would be acquired subject to the exercise of this power.

Another case of involuntary alienation occurs under the operation of the so-called *betterment laws*. Under the common law maxim, *quidquid plantatur solo, solo credit*, whatever is annexed to the soil, whether by the owner or by a stranger, without the consent of the owner, becomes a part of the soil in legal contemplation, and consequently the property of the owner of the soil. If a stranger makes an erection upon the land with the consent of the owner, the property in the house or other erection remains in the licensee, and he can remove it whenever the license is revoked. If he does not then remove it, he loses his right

which have been urged upon our consideration against the validity of this resolution. It is difficult to see any distinction in principle between the two cases. When a sale is made of real estate held in joint tenancy, the tenant opposed to the sale is as much deprived of his estate by the change which is made, as these petitioners are of their property, by the change authorized by this resolution. In either case the parties are not subjected to a loss of their property. It is simply changed from one kind to another." Linsley *v.* Hubbard, 44 Conn. 109 (26 Am. Rep. 431).

"The legislature authorizes the sale, taking care that the proceeds shall go to the trustees for the use and benefit of those having the life estate, and of those having the remainder, as they are entitled under the will. This is depriving no one of his property, but is merely changing real estate into personal estate, for the benefit of all parties in interest. This part of the resolve, therefore, is within the scope of the powers exercised from the earliest times, and repeatedly adjudged to be rightfully exercised by the legislature." Sohier *v.* Mass. Gen. Hospital, 3 Cush. 496; Rice *v.* Parkman, 16 Mass. 326.

to it, and it becomes the property of the owner of the soil.[1]

If the building is erected by a stranger without the consent of the owner of the soil, it at once becomes the property of the latter, although the stranger has made the improvements, believing in good faith that he had a good title to the land.[2] So far as the principle was applied to *bona fide* holders of land under a mistaken claim of title, it gave to the owner of land property to which he could make no moral or equitable claim. His title to the improvements vested simply under the operation of the technical legal rule just stated. In order to remedy this gross injustice of the common law, statutes have been passed in many of the States known as *betterment laws*, which generally, in substance, provide that upon the recovery of land from one who has been a *bona fide* disseisor under color of title, the plaintiff shall reimburse the defendant for the improvements, which he has made under the mistaken belief that he was the owner of the land, or transfer the title to the defendant, upon the payment of the value of the land without the improvements. Although differing somewhat in detail, they all substantially conform to this description. The constitutionality of the statutes has been repeatedly questioned, but they have invariably been sustained.[3]

[1] Tapley *v.* Smith, 18 Me. 12; Russell *v.* Richards, 10 Me. 429; Keyser *v.* School District, 35 N. H. 480; Coleman *v.* Lewis, 27 Pa. St. 291; Reid *v.* Kirk, 12 Rich. 54; Yates *v.* Mullen, 24 Ind. 278; Mott *v.* Palmer, 1 Comst. 571; Hinckley *v.* Baxter, 13 Allen, 139; Antoni *v.* Belknap, 102 Mass. 200; Kutter *v.* Smith, 2 Wall. 491; O'Brien *v.* Kustener, 27 Mich. 292; Ham *v.* Kendall, 111 Mass. 298; Goodman *v.* Hannibal & St. Joseph R. R. Co., 45 Mo. 33.

[2] Osgood *v.* Howard, 6 Greenl. 452; Aldrich *v.* Parsons, 6 N. Y. 555; Dame *v.* Dame, 38 N. H. 429; Ogden *v.* Stock, 34 Ill. 522; Rogers *v.* Woodbury, 15 Pick. 156; Mott *v.* Palmer, 1 Comst. 571; West *v.* Stewart, 7 Pa. St. 122; Webster *v.* Potter, 105 Mass. 416; Powell *v.* M. & B. Mfg. Co., 3 Mason, 369; 2 Kent's Com. 334–338; Tiedeman on Real Prop., § 702.

[3] See Brown *v.* Storm, 4 Vt. 37; Whitney *v.* Richardson, 31 Vt. 300;

The constitutionality of these laws has been generally sustained in their application to improvements already made under a mistaken claim of title, as well as to those made after the enactment of the statutes. Judge Story held [1] that such a law could not constitutionally be made to apply to improvements made before its passage. Mr. Cooley states that this decision was rendered under the New Hampshire constitution, which forbade retrospective laws.[2] But, even independently of this special constitutional provision, and applied to betterment laws generally, the position of Judge Story is sound. Under the legal maxim: *quidquid plantatur solo, solo cedit*, the improvements already made, when the statute was passed, had become the absolute property of the real owner of the land, and a statute which took away the right to these improvements would interfere with vested rights, and for that reason would be unconstitutional. But inasmuch as the right to the improvements subsequently made would depend upon the continued existence of this common-law rule, its repeal or change would prevent the right from vesting, and so far as these statutes gave to the *bona fide* disseisor of the land the right to the improvements made by him after the enactment of the statute, it would not violate any constitutional provision.

If the statute did not go farther in the adjustment of the antagonistic rights of the two claimants, the statute would create in them a species of joint estate. But the statute pro-

Brackett *v.* Norcross, 1 Me. 89; Withington *v.* Corey, 2 N. H. 115; Bacon *v.* Callender, 6 Mass. 303; Fowler *v.* Halbert, 4 Bibb, 54; Hunt's Lessee *v.* McMahon, 5 Ohio, 132; Longworth *v.* Worthington, 6 Ohio, 9; Ross *v.* Irving, 14 Ill. 171; Childs *v.* Shower, 18 Iowa, 261; Pacquette *v.* Pickness, 19 Wis. 219; Armstrong *v.* Jackson. 1 Blackf. 374; Coney *v.* Owen, 6 Watts, 435; Steele *v.* Spruance, 22 Pa. St. 256; Lynch *v.* Burdie, 63 Pa. St. 206; Griswold *v.* Bragg, 48 Conn. 577; Dothage *v.* Stuart, 35 Mo. 570; Fenwick *v.* Gill, 38 Mo. 510; Ormond *v.* Martin, 37 Ala. 598; Pope *v.* Macon, 23 Ark. 644; Howard *v.* Zeyer, 18 La. An. 407; Love *v.* Shartzer, 31 Cal. 487.

[1] In Society, etc., *v.* Wheeler, 2 Gall. 105.

[2] Cooley Const. Lim. 479, note.

ceeds to give to the real owner of the land his election to pay the *bona fide* disseisor the value of the improvements, or to transfer to him the title to the land, upon receiving payment of the value of the land, without the improvements. This latter provision of the statute without doubt works an interference with vested rights, for a man's right of property has been either charged with a burden, in the shape of liability for improvements which he has not directed to be made, or given to another on account of no fault of his own. But circumstances and facts, which cannot be changed in order to place the parties in *statu quo*, have created between them a *quasi*-joint estate of such a nature that the property cannot be mutually profitable without a partition. Compulsory partition of a peculiar kind is ordered, viz.: the owner of the land is obliged to pay for the improvements, or to sell the land to the other claimant. When applied to the improvements, which are made after the enactment of the statute, the statute is as constitutional as the laws which provide for the compulsory partition of ordinary joint estates. "Betterment laws, then, recognize the existence of an equitable right, and give a remedy for its enforcement where none has existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed *in statu quo*, and the statute accomplishes justice as nearly as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property, which adjusts the equities of the parties as nearly as possible

according to natural justice."[1] It was held in Ohio that a statute was unconstitutional, which gave to the occupying claimant the right to buy the land or receive payment for the improvements he had made. The right of election should be given to the owner of the land. The court say: "The occupying claimant act, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner goes to the utmost stretch of the legislative power touching this subject. And the statute, * * * providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the constitution."[2]

It would seem reasonable, also, to maintain that in order that the claim for improvements under the betterment laws may be made, the improvements must be permanent annexations. Where the improvements consist of clearing or draining lands, the benefit has become absolutely inseparable from the land; but where the improvements consist of houses and other buildings, they could be removed in most cases, at least when they were frame buildings. Where the buildings are constructed upon firm and permanent foundation imbedded in the soil, particularly when the buildings are made of brick or stone, the cost of removal would in most cases almost amount to the value of the improvement, and to compel a removal would be almost as unjust as to give the improvements to the owner of the land. But when the buildings are wooden, resting temporarily upon blocks, or upon the ground, by analogy, the distinction between permanent and temporary annexations, which obtain in the law of fixtures, may be recognized in this connection, and in the last case the occupying claimant

[1] Cooley Const. Lim. 480.

[2] McCoy v. Grandy, 3 Ohio St. 463.

may be permitted to remove his temporary structure, but cannot claim any compensation for it under the betterment laws.[1]

§ 139. **Eminent domain — General propositions.**[2] — It has been already explained[3] that all lands were originally the common property of the human race; necessarily so, since land is the free gift of nature, and not the product of man's labor. It was also shown that, under the present law of real property, the private owner of lands acquires only a tenancy of a more or less limited duration under the absolute and ultimate proprietorship of the State, as the representative of organized society, subject to certain conditions, one of which is that the State may at any time, on payment of its value, reclaim the tenancy so granted to private individuals, whenever the public exigencies require such confiscation. This right of confiscation of private lands for public purposes is called the right of eminent domain. Mr. Cooley speaks of eminent domain as referring, not only to those superior rights of the State in the private lands of the individual, but also to any lands which the State may own absolutely, such as public build-

[1] For a discussion of the law of eminent domain, see next section, § 121; for the limitations upon the power of taxation, see *post*, § 129.

[2] In the preparation of the first edition of this book, the position was taken, that the breadth and comprehensiveness of the definitions of Police Power justified the inclusion of the subjects of eminent domain and taxation. But while I do not even now think that that judgment was altogether erroneous, it is nevertheless true that the trend of judicial opinion is decidedly opposed to that theory. For this reason, and also because these two functions of government are treated separately, and the scope of them is determined by an altogether different course of reasoning, I have determined, in the preparation of the second edition, to make no additions to my treatment of the subjects of Eminent Domain and Taxation; while I leave what has been published in the first edition, as evidence of my own conviction, that these functions of government are closely inter-related with the subject of Police Power, as it is understood by the courts.

[3] See § 133.

ings, forts, navigable rivers, etc.[1] It seems to me that this more comprehensive use of the term unnecessarily confounds it with "*public* domain," and deprives it of its technical and special signification. Mr. Cooley also defines the term to mean "that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit without regard to the wishes of its owners,"[2] including personal, as well as real property, except money and rights of action.[3] There is some foundation for this use of the term in the writings of political economists and publicists, and in the *dicta* of judges.[4] It is also true that personal property may be forcibly taken from private owners for public uses, whenever extreme necessity requires it, as in the case of war or of a general famine.[5] But, inasmuch as the grounds for the justification of this involuntary appropriation of private property to public purposes are different, according as the property is real or personal, the former resting upon the claim of a superior property in lands, the other upon the illogical plea of urgent and overruling necessity, it is wise to confine the term "eminent domain" to the cases of land appropriation, and employ some other term to signify

[1] Cooley on Const. Lim. 647, 648.

[2] Cooley on Const. Lim. 649.

[3] Cooley on Const. Lim. 652, 653. "Generally it may be said, legal and equitable rights of every description are liable to be thus appropriated. From this statement, however, must be excepted money, or that which in ordinary use passes as such, and which the government may reach by taxation, and also rights in action, which can only be available when made to produce money; neither of which can it be needful to take under this power."

[4] "The right which belongs to the society or to the sovereign of disposing, in case of necessity, and for the public safety of all the wealth contained in the State, is called the eminent domain." McKinley, J., in Polard's Lessee *v.* Hagan, 3 How. 212, 223. In this case, as in all other actual cases of the exercise of the right of eminent domain, the thing appropriated was land.

[5] See *post*, § 166.

the official appropriation of personal property. Eminent domain, therefore, is the superior right of the State to appropriate for public purposes the private lands within its borders, upon payment of a proper compensation for the property so taken.

§ 140. **Exercise of power regulated by legislature.** — The exercise of this right is in the first instance reposed in the legislature. Until the legislature by enactment determines the conditions under which, and the agencies by which, the power of appropriation may be exercised, there can be no lawful appropriation of lands to public purposes. The exercise of the right is a legislative act, and requires no judicial confiscation of the land, in order to divest the private owner of his title.[1] Except so far as the exercise of the power may be limited and controlled by provisions of the constitution, the necessity for its exercise is left to the legislative discretion. The courts cannot question the necessity for the taking, provided the land is taken for a public purpose. The legislative determination of the necessity is final, and is not subject to review by the courts.

The following quotation, from an opinion of Judge Denio, of the New York Court of Appeals,[2] will be sufficient to explain the reasons by which the exclusion of this question from judicial investigation, and the consequent denial to the property owner of the right to be heard in his behalf, may be justified. The learned judge says: "The question then is, whether the State, in the exercise of the power to appro-

[1] "It requires no judicial condemnation to subject private property to public uses. Like the power to tax, it resides with the legislative department to whom the delegation is made. It may be exercised directly or indirectly by that body; and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted." Kramer *v.* Cleveland & Pittsburg R. R. Co., 5 Ohio St. 140, 146.

[2] People *v.* Smith, 21 N. Y. 595.

priate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether, under the circumstances of a particular case, the property required for the purpose shall be taken or not; and I am of the opinion that the State is not under any obligation to make provision for a judicial contest upon that question. The only part of the constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained.

"It is not pretended that the statute under consideration violates either of these provisions. There is, therefore, no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropritaed and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority. The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury

trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax, or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. It follows from these views that it is not necessary for the legislature, in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceedings with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power is given of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature in its discretion may prescribe." [1]

[1] See also United States *v.* Harris, 1 Sumn. 21; Spring *v.* Russell, 3 Watts, 294; Varick *v.* Smith, 5 Paige Ch. 137 (28 Am. Dec. 417); People *v.* Smith, 21 N. Y. 595; Cooper *v.* Williams, 7 Me. 273; Perry *v.* Wilson, 7 Mass. 395; Aldridge *v.* Railroad Company, 2 Stew. & Port. 199 (23 Am. Dec. 307); O'Hara *v.* Lexington, etc., R. R. Co., 1 Dana, 232; Henry *v.* Underwood, 1 Dana, 247; Waterworks Co. *v.* Burkhardt, 41 Ind. 364; Ford *v.* Chicago, etc., R. R. Co., 14 Wis. 609. But the question whether the appropriation shall be made, may be submitted by the legislature to

While the exercise of the right of eminent domain belongs primarily to the legislature, it is not necessary for it directly to make the appropriation to public uses. Since the exercise of the power is only permissible in the advancement of the public interests; if that requirement is complied with, it is also within the legislative discretion to determine whether the confiscation shall be made by it, or by some other corporate body or individual to whom the power is delegated. If the public interests are subserved best, when the right is exercised by a municipal corporation or a railroad company, there can be no constitutional objection to the delegation of the power, for the burden upon private property is not thereby increased. The grant of the power to a town, city, county or school district, needs no special defense, because the delegate of the power is in each instance only a local branch of the general State government. It is the government in every case which makes the confiscation.

But when the power is granted to a corporation composed of private persons, who procure a grant of the power for the purpose of making a profit out of it; although the use to which the land is put may serve to satisfy a public want, there is more or less disposition to question the constitutional propriety of the delegation of the power. But the constitutional objection is deemed to be untenable. In granting to a private corporation the right of eminent domain, the State does not consider the benefit to the stockholders of the corporation, but rather the public benefit derived from the construction and maintenance of a turnpike, a railroad, etc. It is true that government may undertake these public improvements, but it is the prevailing opinion that the best interests of the public are subserved by granting the right

a vote of the people, or to some court or jury. Iron R. R. Co. *v.* Ironton, 19 Ohio St. 299. And in Michigan, the submission of the question of necessity to a jury, is made by the constitution an indispensable requirement. Mansfield, etc., R. R. Co. *v.* Clark, 23 Mich. 519; Arnold *v.* Decatur, 29 Mich. 11.

to a private corporation which assumes, in return for the right of eminent domain and the private gain to be got out of the business, to satisfy the public want; and the legislature has uniformly been held to hold within its discretion the power of exercising this right or of delegating it, according as the one course or the other seems best to promote the public welfare.[1] Not only is this permissible, but it is also held to be constitutionally unobjectionable to delegate to the corporation or individual, along with the exercise of the right of eminent domain, the power to determine finally upon the necessity for the taking, without any judicial investigation.[2]

But while the power of the legislature to determine the mode and occasion of the exercise of the right of eminent domain is not restricted by constitutional limitations; when the legislature has prescribed the conditions and established regulations for the exercise of the right, the performance of the conditions and the observance of the regulations become an indispensable condition precedent to the exercise of the right, and any failure to comply with the requirements of the statute, will invalidate the confiscation of

[1] Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Stevens *v.* Middlesex Canal, 12 Mass. 466; Boston Mill Dam *v.* Newman, 12 Pick. 467; Lebanon *v.* Olcott, 1 N. H. 339; Petition of Mt. Washington Road Co., 35 N. H. 134; Eaton *v.* Boston C. & M. R. R. Co., 51 N. H. 504; Armington *v.* Barnet, 15 Vt. 745; White River Turnpike *v.* Central R. R. Co., 21 Vt. 590; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Olmstead *v.* Camp, 33 Conn. 532; Beekman *v.* Saratoga & Schenectady R. R. Co., 3 Paige, 73 (22 Am. Dec. 679); Bloodgood *v.* Mohawk & Hudson R. R Co., 18 Wend. 9; Whiteman's Ex'rs *v.* Wilmington, etc., R. R. Co., 2 Harr. 514; Raleigh, etc., R. R. Co. *v.* Davis, 2 Dev. & Bat. 451; Swan *v.* Williams, 2 Mich. 427; Pratt *v.* Brown, 3 Wis. 603; Gilmer *v.* Lime Point, 18 Cal. 229.

[2] People *v.* Smith, 21 N. Y. 595; Lyon *v.* Jerome, 26 Wend. 484; Matter of Fowler, 53 N. Y. 60; N. Y. Central, etc., R. R. Co. *v.* Met. Gas Co. 63 N. Y. 326; Hays *v.* Risher, 32 Pa. St. 169; Chicago, etc., R. R. Co. *v.* Lake, 71 Ill. 333; North Missouri R. R. Co. *v.* Lackland, 25 Mo. 515; North Mo. R. R. Co. *v.* Gott, 25 Mo. 540; Bankhead *v.* Browny, 25 Iowa 540; Warren *v.* St. Paul, etc., R. R. Co., 18 Minn. 384.

property. There must be a most scrupulous observance of all those provisions which were designed to serve as a protection to the interests of the land owner.[1]

It is also recognized as an invariable corollary to this rule, that the grants of the right of eminent domain are to be strictly construed, and the powers delegated are not to be extended by construction beyond the express limitation of the statute. "There is no rule more familiar or better settled than this; that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself,

[1] "The statute says that, after a certain other act shall have been passed, the company may then proceed to take private property for the use of its road; that is equivalent to saying that the right shall not be exercised without such subsequent act. The right to take private property for public use is one of the highest prerogatives of the sovereign power; and here the legislature has, in language not to be mistaken, expressed its intention to reserve that power until it could judge for itself whether the proposed road would be of sufficient public utility to justify the use of this high prerogative. It did not intend to cast this power away, to be gathered up and used by any who might choose to exercise it." Gillinwater *v.* Miss., etc., R. R. Co., 13 Ill. 1, 4. See Baltimore, etc., R. R. Co. *v.* Nesbit, 10 How. 395; Stacy *v.* Vt. Cent. R. R. Co., 27 Vt. 39; Burt *v.* Brigham, 117 Mass. 307; Wamesit Power Co. *v.* Allen, 120 Mass. 352; Lund *v.* New Bedford, 121 Mass. 286; Nichols *v.* Bridgeport, 23 Conn. 189; Judson *v.* Bridgeport, 25 Conn. 426; Bloodgood *v.* Mohawk, etc., R. R. Co., 18 Wend. 9; Reitenbaugh *v.* Chester Valley R. R. Co., 21 Pa. St. 100; State *v.* Seymour, 35 N. J. L. 47; W. Va. Transportation Co. *v.* Volcanic Oil & Coal Co., 5 W. Va. 382; Supervisors of Doddridge *v.* Stout, 9 W. Va. 703; Decatur Co. *v.* Humphreys, 47 Ga. 565; Cameron *v.* Supervisors, etc., 47 Miss. 264; St. Louis, etc., R. R. Co. *v.* Peters, 68 Ill. 144; Mitchell *v.* Illinois, etc., Coal Co. 68 Ill. 286; Chicago, etc., R. R. Co. *v.* Smith, 78 Ill., 96; People *v.* Brighton, 20 Mich. 57; Power's Appeal, 29 Mich. 504; Kroop *v.* Forman, 31 Mich. 144; Moore *v.* Railway Co., 34 Wis. 173; Bohlman *v.* Green Bay, etc., R. R. Co., 40 Wis. 157; Delphi *v.* Evans, 36 Ind. 90; Ellis *v.* Pac. R. R. Co., 51 Mo. 200; United States *v.* Reed, 56 Mo. 565; Commissioners *v.* Beckwith, 10 Kan. 603; St. Joseph, etc., R. R. Co. *v.* Callender, 13 Kan. 496; Stanford *v.* Worn, 27 Cal. 171; Brady *v.* Bronson, 45 Cal. 640; Stockton *v.* Whitmore, 50 Cal. 554; Paris *v.* Mason, 37 Texas, 447.

and interfering most seriously and often vexatiously with the ordinary rights of property." [1]

But there are two constitutional limitations, which are imposed very generally upon the exercise of the right of eminent domain; and it is also a judicial question whether the legislature, in the exercise of the right, has fully complied with their requirements. One has reference to the ascertainment and payment of the compensation to the land owner for the loss of his land, which will be discussed subsequently; [2] and the second provides that the private land of the individual shall not be taken in the exercise of the right of eminent domain except for public purposes. It is a legislative question whether the public exigencies require the appropriation; but it is clearly a judicial question, whether a particular confiscation of land has been made for a public purpose.[3]

§ 141. **Public purpose, what is a.** — The authorities are unanimous in the recognition of the abstract proposition, that the legislature cannot in the exercise of the right of eminent domain, even when the compensation is made on the most liberal terms, take the land from a private owner and appropriate it to any but a public use.[4] But a careful reading

[1] Currier *v.* Marietta, etc., R. R. Co., 11 Ohio St. 228, 231. See W. Va. Transportation Co. *v.* Volcanic Oil & Coal Co., 5 W. Va. 382; Bruning *v.* N. O. Canal & Banking Co., 12 La. Ann. 541; Gilmer *v.* Lime Point, 19 Cal. 47.

[2] See *post*, § 143.

[3] Tyler *v.* Beacher, 44 Vt. 648; Olmstead *v.* Camp, 33 Conn. 551; Beekman *v.* Railroad Company, 3 Paige, 45 (22 Am. Dec. 679); Matter of Deansville Cemetery Association, 66 N. Y. 569 (23 Am. Rep. 86); Scudder *v.* Trenton, etc., Co., 1 N. J. Eq. 694 (23 Am. Dec. 756); Loughbridge *v.* Harris, 42 Ga. 500; Harding *v.* Goodlett, 3 Yerg. 40 (24 Am. Dec. 546); Chicago, etc., R. R. Co. *v.* Lake, 71 Ill. 333; Water Works Co. *v.* Burkhardt, 41 Ind. 364; Ryerson *v.* Brown, 35 Mich. 333 (24 Am. Rep. 564); Bankhead *v.* Brown, 25 Iowa, 540.

[4] "The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way pro-

of the authorities fails to develop any definite meaning for the term "public use." As long as the government exercises the right directly and for the State's immediate benefit, no difficulty is experienced in determining what is a public use. There can be no doubt that land is devoted to a public use, when it is taken for the purpose of laying out parks, and public gardens,[1] for the construction of public buildings of all kinds,[2] aqueducts, drains and sewers,[3] and the building

moted by such transfer." Beekman *v.* Saratoga, etc., R. R. Co., 3 Paige, 73 (22 Am. Dec. 679). "It is true there is neither in our constitution nor in the constitution of the other States, any express provision forbidding that private property should be taken for the private use of another, or any constitutional provision forbidding the legislature to pass laws, whereby the private property of one citizen may be taken and transferred to another for his private use without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the constitution or bill of rights, as the exercise of such arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive nor judicial department can possess unlimited power. Such a power as that of taking the private property of one and transferring it to another for his own use, is not in its nature legislative, and it is only legislative power, which by the constitution is conferred on the legislature. Such an act, if passed by the legislature, would not in its nature be law, but would really be an act of robbery, the exercise of an arbitrary power not conferred on the legislature." Varner *v.* Martin, 21 W. Va. 548. See, also, to the same effect, Bloodgood *v.* Mohawk, etc., R. R. Co., 18 Wend. 955; Matter of Albany St., 11 Wend. 149 (25 Am. Dec. 618); Embury *v.* Conner, 3 N. Y. 511; N. Y., etc., R. R. Co. *v.* Kip, 46 N. Y. 546 (7 Am. Rep. 383); Teneyck *v.* Canal Co., 18 N. J. 200 (37 Am. Dec. 233); Edgewood R. R. Co.'s appeal, 79 Pa. St. 277; Concord R. R. Co. *v.* Greeley, 17 N. H. 47; Buckingham *v.* Smith, 10 Ohio, 288; Cooper *v.* Williams, 5 Ohio, 391 (24 Am. Dec. 299); Pratt *v.* Brown, 3 Wis. 603; Sadler *v.* Langham, 34 Ala. 311.

[1] Owners of Ground *v.* Mayor, etc., of Albany, 15 Wend. 374; Matter of Central Park Extension, 16 Abb. Pr. 56; Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y. 234 (6 Am. Rep. 70); County Court *v.* Griswold, 58 Mo. 175.

[2] Hooper *v.* Bridgewater, 102 Mass. 512; Williams *v.* School District, 33 Vt. 271; Long *v.* Fuller, 68 Pa. St. 170.

[3] Ham *v.* Salem, 100 Mass. 350; French *v.* White, 24 Conn. 174; Gardner *v.* Newburg, 2 Johns. Ch. 162 (7 Am. Dec. 526); Reddall *v.*

of levees on the banks of the Mississippi.[1] It is likewise freely admitted that the State may appropriate lands without limitation for the purpose of laying out streets and highways. In all these cases of the exercise of the right of eminent domain, the land is taken for the general use of the public, and therefore is devoted to a public use. If in any one of these cases the land was to be used by a few private individuals, and not by the public generally, it would not be a taking for a public use, and consequently it would be unlawful.

Considerable doubt has been felt and expressed concerning the constitutionality of State statutes, providing for the opening and maintenance of so-called private roads, at the expense of the person or persons who may be benefited thereby. These statutes usually provide that some local office or officers, usually the county court, shall in all cases, where the public necessity will not justify the opening of a public road, to be constructed and maintained at the expense of the county, authorize, under certain limitations, those persons who will be benefited by the opening of such a road, to construct and maintain it at their own expense, and to appropriate whatever land is needful. The constitutionality of these statutes has been attacked, on the ground that the roads, thus established, were private and not for the benefit of the general public.[2]

Bryan, 14 Md. 444; Kane *v.* Baltimore, 15 Md. 240; Burden *v.* Stein, 27 Ala. 104; Matter of Drainage of Lands, 34 N. J. L. 497; People *v.* Nearing, 27 N. Y. 306; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Anderson *v.* Kerns Draining Co., 14 Ind. 199; Hildreth *v.* Lowell, 11 Gray, 345.

[1] Mithoff *v.* Carrollton, 12 La. Ann. 185; Cash *v.* Whitworth, 13 La. 401; Inge *v.* Police Jury, 14 La. Ann. 117.

[2] Taylor *v.* Porter, 4 Hill, 140; Buffalo & N. Y. R. R. Co. *v.* Brainard, 9 N. Y. 100; Tyler *v.* Beacher, 44 Vt. 648 (8 Am. Rep. 398); Bradley *v.* N. Y., etc., R. R. Co., 21 Conn. 294; Pittsburg *v.* Scott, 1 Pa. St. 809; Varner *v.* Martin, 21 W. Va. 534; Young *v.* McKenzie, 3 Ga. 31; Hickman's Case, 4 Harr. 580; Sadler *v.* Langham, 34 Ala. 311; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Wild *v.* Deig, 43 Ind. 45 (13 Am. Rep. 399);

The difficulty in the way of a clear understanding of the matter is increased by a failure to appreciate the difference between a public and a private road. If one or more individuals have the power to appropriate land for the opening of a road for their exclusive benefit, from which they may shut out the general public, and which they may maintain or discontinue at their pleasure, without any supervisory control on the part of the State or municipal authorities, the road is most certainly a private one, and the forcible appropriation of land for it is a taking of private property without due process of law. But if the road is open to the general public, and the persons, for whose special benefit the road was established, have not the power of closing it up at will, but upon them the expense of constructing it and maintaining it is imposed; even though they may at will discontinue the repairs, the road is a public one, notwithstanding it is called by the statute authorizing it a private road, and it is opened for the special benefit of those, who assume the expense of its construction and maintenance. It being open to the public, the fact that there is no pressing public need for the road is not open to judicial investigation. The legislature is the sole judge of the necessity for the appropriation of private lands to a public use. The following quotation from an opinion of the Supreme Court of Iowa will amply illustrate the limitations upon the power of establishing "private" roads over private lands: "The State may properly provide for the establishment of a public road or

Stewart *v.* Hartman, 46 Ind. 331; Blackman *v.* Halves, 72 Ind. 515; Osborn *v.* Hart, 24 Wis. 89 (1 Am. Rep. 161); Nesbit *v.* Trumbo, 39 Ill. 110; Dickey *v.* Tennison, 27 Mo. 373; Bankhead *v.* Brown, 25 Iowa, 540; Witham *v.* Osburn, 4 Ore. 318 (18 Am. Rep. 287). But see Whittingham *v.* Bowen, 22 Vt. 317; Bell *v.* Prouty, 43 Vt. 279; Proctor *v.* Andover, 42 N. H. 348; Pocopson Road, 16 Pa. St. 15; Harvey *v.* Thomas, 10 Watts, 63; Ferris *v.* Bramble, 5 Ohio St. 109; Robinson *v.* Swope, 12 Bush, 21; Sherman *v.* Brick, 32 Cal. 241, in which the constitutionality of such appropriations is more or less sustained.

highway to enable every citizen to discharge his duties. The State is not bound to allow its citizens to be walled in, insulated, imprisoned, but may provide them a way of deliverance. The State may provide a public highway to a man's house, or a public highway to coal or other mines. If the road now in question had been established as a public road under the general road law, as we confess we do not see why it might not have been, there would be in our minds no doubt of its validity, although it does not exceed a half mile in length, and traverses the lands of but a single person. For the right to take land for a public road, that is, a road demanded by public convenience, as an outlet to a neighborhood, or it may be as I think for a single farmer, without other means of communication, cannot depend upon the length of the road, or the number of persons through whose property it may pass.

"With respect to the act of 1866, we are of opinion that the roads thereunder established are essentially private, that is, the private property of the applicant therefor, because: *First*, the statute denominates them private roads. If these roads are not private and different from ordinary and public roads, there was no necessity for these provisions. *Secondly*, such a road may be established upon the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may require. *Thirdly*, the public are not bound to keep such roads in repair, and this is a satisfactory test as to whether a road is public or private.[1] *Fourthly*, we see no reason when such a road is established, why the person at whose instance it was done might not lock

[1] The second and third reasons for holding the road to be a private one here stated, rather establish a rebuttable than a conclusive presumption in favor of its private character. The establishment of the road upon the petition of the applicant, and its construction and maintenance at his expense, are not necessarily inconsistent with its being a public road, if the public have the use of it, and cannot be excluded from it.

the gates opening into it or fence it up, or otherwise debar the public of any right thereto. Could not the plaintiffs, in this case, having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish the fact, that it is essentially *private?* For it must be private if it is of such a nature, that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it? If the act of 1866 is valid, might not the plaintiffs, having procured the road, use it for laying down a horse or tramway, and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These conditions make the great difference between such a road and a public highway, and demonstrate the essentially private character of the road."[1]

The difficulty of determining what is a public use becomes greater and more perplexing, when the attention is turned to those cases in which the right of eminent domain is exercised, not by the State or municipality, but by some private stock corporation, which undertakes the performance of the public work, in consideration of the tolls and other returns which they are permitted to require of the public for the outlay

[1] Dillon, Ch. J., in Bankhead *v.* Brown, 25 Iowa, 545. "The use, convenience and advantage of the public, contemplated by the law, are benefits arising out of the aggregate of such improvements, to which a particular road so established contributes to a greater or less degree. But no limitation upon the power of the court, in regard to any proposed road, is to be found in the degree of accommodation, which it may extend to the public at large. This is a matter which addresses itself not to the authority, but the discretion of the court. It cannot be predicated of any road that it will be of direct utility to all the citizens of the county. It may accommodate in travel and transportation but a small neighborhood, or only a few individuals. Still, when established, it may be used at pleasure by all the citizens of the county or country; and the public is interested in the accommodation of all the members of the community." Lewis *v.* Washington, 5 Gratt. 265. See Varner *v.* Martin, 21 W. Va. 534, for a most exhaustive review of the law and authorities on this subject.

of the capital they have made. We have already seen [1] that the right of eminent domain may be delegated to private individuals and corporations, provided it is exercised in the promotion of some public good. It is plain enough that the establishment of railroads, turnpikes, canals and other means of transportation and locomotion is as much a public use as the construction of public streets or highways. The facts, that they are established and owned by private individuals or corporations, and that the general public must pay a certain fee or toll for the privilege of using them, do not affect their legal character. For, as Mr. Cooley says, "the common highway is kept in repair by assessments of labor and money; the tolls paid upon turnpikes, or the fares on railways, are the equivalents to these assessments; and when these improved ways are required by law to be kept open for use by the public impartially, they also may properly be called highways, and the use to which land for their construction is put be denominated a public use." [2]

We again reach contested ground, when we inquire into the power of the government to authorize the exercise of the right of eminent domain in the condemnation of lands for manufacturing and industrial purposes. The question has usually arisen in the request for the condemnation of lands on the banks of a river, for the establishment of some sort of mill run by water power. Before the days of steam, water was the only motive power, and sometimes a whole community would depend for milling facilities upon the caprice or avarice of one or more men. It is true that at present a mill site on the river bank is not so essential to industrial activity, but it is still important on the ground of economy, water power being cheaper than steam. In most of the States, in which the question has arisen, such appropriations of land have been sustained as being for the public

[1] See § 139.

[2] Cooley on Const. Lim. 660, 661.

good, if not for a public use.[1] But in New York and other States the power of exercising the right of eminent domain in favor of manufacturing and milling industries is denied.[2]

In pronouncing the opinion of the Supreme Court of Massachusetts in favor of such an exercise of the right of eminent domain, Shaw, Ch. J., said: "It is then contended that if this act was intended to authorize the defendant company to take the mill power and mill of the plaintiff, it was void because it was not taken for public use, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it we must look to the declared purposes of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use. The declared purposes are to improve the navigation of the Merrimac river and to create a large mill power for mechanical and manufacturing purposes. * * * That the improvement of the navigation of a river is done for the public use, has been too frequently decided and acted upon to require authorities, and so to create a wholly artificial navigation by canals. The establishment of a great mill power for manu-

[1] Fisher *v.* Manufacturing Co., 12 Pick. 67; Boston & Roxbury Mill Co. *v.* Newman, 12 Pick. 467; Olmstead *v.* Camp, 33 Conn. 532; Great Falls Manuf. Co. *v.* Fernald, 47 N. H. 444; Ash *v.* Cummings, 50 N. H. 591; Jordan *v.* Woodward, 40 Me. 317; Crenshaw *v.* State River Co., 6 Rand. 245; Burgess *v.* Clark, 13 Ired. 109; Smith *v.* Connelly, 1 T. B. Mon. 58; Shackleford *v.* Coffey, J. J. Marsh, 40; Newcome *v.* Smith, 1 Chand. 71; Thien *v.* Voegtlander, 3 Wis. 461; Pratt *v.* Brown, 8 Wis. 603 (but see Fisher *v.* Horricon Co., 10 Wis. 351; Curtis *v.* Whipple, 24 Wis. 350); Miller *v.* Troosh, 14 Minn. 365; Venard *v.* Cross, 8 Kan. 248; Harding *v.* Funk, 8 Kan. 315.

[2] Hay *v.* Cohoes Company, 3 Barb. 47; Ryerson *v.* Brown, 35 Mich. 333 (24 Am. Rep. 564); Loughbridge *v.* Harris, 42 Ga. 500; Tyler *v.* Beacher, 44 Vt. 648 (8 Am. Rep. 398); Sadler *v.* Langham, 34 Ala. 311. In the last two cases, the right to condemn lands for mill sites was recognized, provided the mill owners were required to serve the public impartially.

facturing purposes, as an object of great interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the commonwealth, and in our judgment rightly so, in determining what is a public use, justifying the exercise of eminent domain. * * * That the erection of this dam would have a strong and direct tendency to advance both these public objects, there is no doubt." [1]

On the same general grounds, in the exercise of the right of eminent domain, lands have been appropriated for use as a cemetery.[2]

A careful reading of the authorities forces one to the conclusion that the term *public use*, is either misused, or is given a peculiar meaning in the law of eminent domain, very different from what it generally bears in other branches of the law; and this thought is most strongly forced upon us in learning from the cases, that the establishment of a private mill is such a public use as will justify the exercise of the right of eminent domain in its favor.[3]

[1] Hazen *v.* Essex Company, 12 Cush. 475.

[2] Edgecombe *v.* Burlington, 46 Vt. 118; Balch *v.* Commissioners, 103 Mass. 106; Evergreen Cemetery *v.* New Haven, 43 Conn. 234; Matter of Deansville Cemetery, 66 N. Y. 569. But in the last the power to condemn lands for cemetery purposes was denied to a strictly private corporation.

[3] "Reasoning by analogy from one of the sovereign powers of government to another is exceedingly liable to deceive and mislead. An object may be public in one sense and for one purpose, when in a general sense and for other purposes it would be idle or misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. The sovereign police power which the State exercises is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the commonwealth. The conduct of every individual, and the use of all property and of all rights is regulated by it, to any extent found necessary for the preservation of the public order, and also for the protection of the private rights of one individual against encroachments by others. The sovereign power of taxation is employed in a great many cases where the power of emi-

Indeed, it would appear more correct to say, that while the term *public use* was originally employed in the law of eminent domain as meaning a use by some governmental agency, the ever-increasing complications of modern civilization have compelled an application of the right of eminent domain to other than public or governmental uses, and the meaning of the term *public use* was broadened from

nent domain might be made more immediately efficient and available, if constitutional principles could suffer it to be resorted to; but each of these has its own peculiar and appropriate sphere, and the object which is *public* for the demands of the one is not necessarily of a character to permit the exercise of the other. (That Eminent Domain and Taxation are but special phases of police power, and not distinct and separate powers of government, see *ante*, § 1.)

"If we examine the subject critically we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable; and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step further, and that is in the same direction. Every man has an abstract right to the exclusive use of his own property for his own enjoyment in such manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the center of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property in his own way is compelled to yield to the general comfort and protection of the community, and to a proper regard to relative rights in others. The situation of his property may even be such that he is compelled to dispose of it because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood, and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. * * * Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needful industry has a right to exist, and the community has a right to demand that it be permitted to exist, and if for that purpose a peculiar locality already in possession of an individual is essential, the owner's right to undisturbed occupancy must yield to the superior

time to time in order to cover these new applications of the right, until now the term is synonymous with *public good*, and justifies the following language of Chancellor Walworth. In defining what is a public use,[1] he said: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine, whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose. It is upon this principle that the legislatures of several of the States have authorized the condemnation of lands for mill sites, where from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants, without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes, and of bringing water to cities and villages. In all such cases the object of the legislative

interest of the public. A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare, could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him. The law interferes in these cases, and regulates the relative rights of the owner and of the community with as strict regard to justice and equity as the circumstances will permit. It does not deprive the owner of his property, but it compels him to dispose of so much of it as is essential on equitable terms. While, therefore, eminent domain establishes no industry, it so regulates the relative rights of all that no individual shall have it in his power to preclude its establishment." People *v.* Township Board of Salem, 20 Mich. 452.

[1] Beekman *v.* Schenectady and Saratoga R. R. Co., 3 Paige, 45, 73 (22 Am. Dec. 679).

grant of power is the public benefit derived from the contemplated improvement which is to be effected directly by the agents of the government, or through the medium of corporate bodies, or of individual enterprise." In commenting upon this language of Chancellor Walworth, Judge Cooley says:[1] "It would not be entirely safe, however, to apply with much liberality the language above quoted, that, 'where the public interest can be in any way promoted by the taking of private property,' the taking can be considered for a public use. It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone, that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions."

It is true that the common law has never sanctioned the condemnation of private property for all the purposes enumerated by Judge Cooley; and it is likewise true, that in condemning lands for such purposes, it could not, with any proper use of the term, be called a taking for a public use; but there is nothing in our constitutions which require a taking for a public use. We have, as the sole authority for the requirement, the

[1] Cooley Const. Lim. 660.

judicial opinion that it is unrepublican to take private property for any but a public use; but we claim that the courts, at least in later years, meant thereby that private property cannot be taken, except to promote some public good, when they required it to be a taking for a public use. There is, therefore, no constitutional limitation upon the power of the government, to declare an appropriation of lands in the possession of private persons for the construction of mills, the improvement of wild lands, the drainage of low lands, and for the promotion of any public benefit, where the avarice or selfishness of the private owner necessitates a condemnation of such lands. It is unquestionably unconstitutional and inconsistent with republican principles, for a government arbitrarily to take the property of one man and give it to another, or to do so in any case where the public interest will not thereby be promoted. There is certainly some danger of an arbitrary or unreasonable exercise of the power, since the legislature is the supreme judge of the necessity of the condemnation; and it may be wise to impose such limitations upon the power of the legislature as will serve as safeguards against arbitrary interferences with private property; but it cannot be said to be unrepublican to require the owners of lands to so use them as will best promote the public welfare. It is highly republican in principle to place the public good (*res publica*) above the selfish interest of the individual; and inasmuch as the ultimate property in lands is vested in the State for the common benefit, it is not unreasonable to claim that all private property in lands is acquired and held, subject to the condition, among others, that it may be reclaimed by the State whenever the public interests demand it. There is nothing fundamentally unjust in such a principle, although it may easily be made the cover for some arbitrary and iniquitous transactions.

During the present year, (1886) a bill was proposed by the English cabinet to make a forced purchase of the lands

of Irish landlords, and to divide up the land into small holdings, and sell the same to the Irish tenantry on easy terms. The object of the bill was to remedy the agrarian evil, which at some time in its history troubles every thickly settled community; and while it was vigorously and successfully opposed, the objections to its passage were economical and not constitutional. In a less justifiable case, the Prussian landtag, at the instance of Prince Bismarck, has expropriated the lands of the hostile Polish population of Posen, in order to provide for a German settlement.

Any taking of land from one man and giving it to another in this country, would at the present day be unjustifiable, because land is not yet scarce enough; or, more correctly stated, the population is not yet large enough to make expropriation of lands a public necessity. But if a similar state of affairs were to arise in one of the American States as exists in Ireland to-day, and the public order and peace were daily and hourly threatened by the lack of small land holdings, and the exactions of absentee landlords; if the quiet and order of prosperous times could be restored by an expropriation of the land of large land owners, it would be eminently republican for the State to do so; taking care that the expropriation does not extend beyond the public necessity. If the land owner is rendering his equivalent to society for his ownership of the lands, there will be no agrarian evil; and he is not entitled, as against the superior demands of society, to the unearned increment, where he does not add to it by the expenditure of capital or labor.

§ 142. **What property may be taken.** — Every species of real property may be taken in the exercise of the right of eminent domain. Not only the land itself may be taken, but also anything which may actually, or in legal contemplation, be considered a part of the land: All build-

ings and other structures that may be in the way of the public use of the condemned lands;[1] the streams of water,[2] the stone, gravel and wood that may be needed for the promotion of the public improvement,[3] apart from the land itself. An easement may be acquired over the land, while the land remained private property, and so also may franchises be condemned.[4] But in all of these cases no more of the property can be taken than what is necessary to serve the public purpose for which it is condemned. No other considerations will justify the taking of the whole of a man's property, when only a part is needed; and the excessive appropriation must under all circumstances be held to be unconstitutional. This limitation is best explained by a reference to the facts of a case, which arose in the State of New York.[5] By a statute, municipal corporations were authorized, in condemning a part of a city lot for the purpose of extending, or widening the streets, to appropriate the

[1] Wells *v.* Somerset, etc., R. R. Co., 47 Me. 345.

[2] Gardner *v.* Newburg, 2 Johns. Ch. 162 (7 Am. Dec. 526); Johnson *v.* Atlantic, etc., R. R. Co., 35 N. H. 569; Baltimore, etc., R. R. Co. *v.* Magruder, 35 Md. 79 (6 Am. Rep. 310).

[3] Jerome *v.* Ross, 7 Johns. Ch. 315 (11 Am. Dec. 484); Wheelock *v.* Young, 4 Wend. 647; Lyon *v.* Jerome, 15 Wend. 569; Bliss *v.* Hosmer, 15 Ohio, 44; Watkins *v.* Walker Co., 18 Texas, 585.

[4] West River Bridge *v.* Dix, 6 How. 507; Richmond R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; State *v.* Noyes, 47 Me. 189; Armington *v.* Barnet, 15 Vt. 745; White River Turnpike Co. *v.* Vt. Cent. R. R. Co., 21 Vt. 590; Pistaque Bridge Co. *v.* New Hampshire Bridge, 7 N. H. 35; Boston Water Power Co. *v.* Boston, etc., R. R. Co., 23 Pick. 360; Central Bridge Co. *v.* Lowell, 4 Gray, 474; In re Rochester Water Commissioners, 66 N. Y. 413; Commonwealth *v.* Pa. Canal Co., 66 Pa. St. 41 (5 Am. Rep. 329); In re Towanda Bridge, 91 Pa. St. 216; Tuckahoe Canal Co. *v.* R. R. Co., 11 Leigh, 42 (36 Am. Dec. 374); Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. R. Co., 4 Gill & J. 5; No. Ca., etc., R. R. Co. *v.* Carolina Cent., etc., R. R. Co., 83 N. C. 489; New Orleans, etc., R. R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211; Little Miamia, etc., R. R. Co. *v.* Darton, 23 Ohio St. 510; New Castle, etc., R. R. Co. *v.* Peru, etc., R. R. Co., 3 Ind. 464; Lake Shore, etc., R. R. Co. *v.* Chicago, etc., R. R. Co., 97 Ill. 506; Central City Horse Railway Co. *v.* Fort Clark, etc., Ry. Co., 87 Ill. 523.

[5] Matter of Albany St., 11 Wend. 151 (25 Am. Dec. 618).

whole, if it was deemed advisable, and to sell or otherwise dispose of the part not needed for the improvement of the street. The statute was pronounced unconstitutional. In delivering the opinion of the court, the Chief Justice, Savage, said: "If this provision was intended merely to give to the corporation capacity to take property under such circumstances with consent of the owner, and then to dispose of the same, there can be no objection to it; but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another. It is in violation of natural right; and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient when the greater part of a lot is taken, and only a small part left, not required for public use, and that small part of but little value in the hands of the owner. In such case the corporation has been supposed best qualified to take and dispose of such parcels, or gores, as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of this court. Suppose a case where only a few feet, or even inches, are wanted, from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot; would the power be conceded to exist to take the whole lot, whether the owner consented or not? The quantity of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legis-

lature thus to dispose of private property, whether feet or acres are the subject of this assumed power." [1] It has also been held, that in establishing a public improvement, it is the duty of those who are exercising the right of eminent domain to avoid as much as possible the diversion of streams, and to construct whatever culverts and bridges may be necessary to keep the streams in their regular channels.[2]

Another application of the same principle would lead to the conclusion, that where the fee simple estate in the land was not needed, only a less estate or an easement should be taken; and that the taking of the fee under such circumstances would be an unlawful appropriation. In the absence of statutory regulations to the contrary, it is certainly a conclusive presumption, that where less than a fee is needed for the public use, and a joint occupation of the land by the public and by the private individual was possible as in the case of a highway, the fee is not taken for the public use; and if there should at any time be a discontinuance of the public use, the land would be relieved of the public easement, and become again the absolute property of the original owner.[3] But in some of the States, it is

[1] See, to the same effect, Dunn *v.* City Council, Harp. 129; Baltimore, etc., R. R. Co. *v.* Pittsburg, etc., R. R. Co., 17 W. Va. 812; Paul *v.* Detroit, 32 Mich. 108. In Embury *v.* Conner, 3 N. Y. 511, it was held that this excessive appropriation of land beyond what is needed for the public use was permissible, provided it was not done against the consent of the owner.

[2] See Proprietors, etc., *v.* Nashua R. R. Co., 10 Cush. 388; March *v.* Portsmouth, etc., R. R. Co., 19 N. H. 372; Rowe *v.* Addison, 34 N. H. 306; Haynes *v.* Burlington, 38 Vt. 350; Boughton *v.* Carter, 18 Johns. 405; Stein *v.* Burden, 24 Ala. 130; Pettigrew *v.* Evansville 25 Wis. 223; Arimond *v.* Green Bay Co., 31 Wis. 316.

[3] Rust *v.* Lowe, 6 Mass. 90; Barclay *v.* Howell's Lessee, 6 Pet. 498; Weston *v.* Foster, 7 Met. 297; Dean *v.* Sullivan R. R. Co., 22 N. H. 316; Blake *v.* Rich, 34 N. H. 282; Jackson *v.* Rutland, etc., R. R. Co., 25 Vt. 150; Giesy *v.* Cincinnati, etc., R. R. Co., 4 Ohio St. 308; Jackson *v.* Hathaway, 15 Johns. 447; Henry *v.* Dubuque & Pacific R. R. Co., 2 Iowa, 288; Elliott *v.* Fair Haven, etc., R. R. Co., 32 Conn. 579, 586; Imlay *v.* Union

now provided by the statute that in appropriation of lands for highways, the fee shall be held to be condemned, and not simply a public easement acquired.[1] And it would seem plausible that in the case of an ordinary highway the fee might be needed for use as a highway, since the demands of modern civilization require the soil of the streets of a city to contain embedded in it the gas, water and sewer pipes, the telephone, telegraph, and electric light wires, etc., as well as to be used as a highway, — thus rendering a joint occupation of the land by the public and the private owner impossible. It is by no means unreasonable, therefore, to provide for the condemnation of the fee in the beginning, instead of allowing successive condemnations of the soil, as the public demands each particular use to which it can be put. But it is hard to see the reason why in the condemnations of land, for other purposes, for railroad purposes, for example, the fee should be taken; and unless the necessity of taking the fee is proven, the taking would be an unlawful condemnation of private property.[2] But if the fee is necessary, the taking of the fee for any purpose is lawful; and it seems to be the prevailing opinion that the question, whether it is necessary is a legislative, and not a judicial one. The declaration of the legislature, that the fee is necessary, is, therefore, final and conclusive.[3]

Branch R. R. Co., 26 Conn. 249; State *v.* Laverack, 34 N. J. 201; Railroad Co. *v.* Shurmeir, 7 Wall. 272.

[1] People *v.* Kerr, 37 Barb. 357; *s. c.* 27 N. Y. 188; Brooklyn Central, etc., R. R. Co. *v.* Brooklyn City R. R. Co., 33 Barb. 420; Brooklyn & Newton R. R. Co. *v.* Coney Island R. R. Co., 35 Barb. 364; Protzman *v.* Indianapolis, etc., R. R. Co., 9 Ind. 467; New Albany & Salem R. R. Co. *v.* O'Dailey, 13 Ind. 353; Street Railway *v.* Cummingsville, 14 Ohio St. 523; State *v.* Cincinnati Gas Co., 18 Ohio St. 262; Millburn *v.* Cedar Rapids, etc., R. R. Co., 12 Iowa, 246; Franz *v.* Railroad Co., 55 Iowa, 107; Moses *v.* Pittsburg, etc., R. R., 21 Ill. 516.

[2] New Orleans, etc., R. R. Co. *v.* Gay, 32 La. Ann. 471. In Illinois the condemnation of the fee for railroad purposes is expressly forbidden. Const. Ill. 1870, art. 2, § 13.

[3] In Hayward *v.* Mayor, etc., of New York, 7 N. Y. 314, 325, it is said

But while the appropriation of land, in the exercise of the right of eminent domain, must be confined to the necessity; on the other hand, that amount may be appropriated, not only what is directly necessary for public use, but also whatever is incidentally needed, such as the workshops and depots of railroads.[1] But the appropriation of lands for such incidental purposes must fall within a fair construction of the grant of power by the legislature, in order to be allowable; for the power to make such an appropriation cannot be justified by a consideration of its convenience or appropriateness, if it is not expressly conferred. Thus it was held that where a railroad company was granted the power "to enter upon any land to survey, lay down and construct its road," "to locate and construct branch roads," etc., to take land "for necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to con-

that the power of deciding upon the need of the fee, "must of necessity rest in the legislature, in order to secure the useful exercise and enjoyment of the right in question. A case might arise where a temporary use would be all that the public interest required. Another case might require the permanent, and apparently the perpetual, occupation and enjoyment of the property by the public, and the right to take it must be co-extensive with the necessity of the case, and the measure of compensation should, of course, be graduated by the nature and the duration of the estate or interest of which the owner is deprived." In this case the land was appropriated for the purpose of extending the almshouse. See, also, Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y. 234 (6 Am. Rep. 70); Dingley *v.* Boston, 100 Mass. 544; Baker *v.* Johnson, 2 Hill, 343; Munger *v.* Tonawanda R R. Co., 4 N. Y. 349; Rexford *v.* Knight, 11 N. Y. 308; Coster *v.* N. J. R. R. Co., 22 N. J. 227; Plitt *v.* Cox, 43 Pa. St. 486; Water Works Co. *v.* Burkhart, 41 Ind. 364.

[1] N. Y. & Harlem R. R. Co. *v.* Kip, 46 N. Y. 546 (7 Am. Rep. 385); Chicago, etc., R. R. Co. *v.* Wilson, 17 Ill. 123; Low *v.* Galena, etc., R. R. Co., 18 Ill. 324; Giesy *v.* Cincinnati, etc., R. R. Co., 4 Ohio St. 308. In Eldridge *v.* Smith, 34 Vt. 484, it was held that the erection of buildings for the manufacture of cars, or for leasing to the employees of the road, was not so necessary to the conduct and management of a railroad, as to justify the condemnation of lands for such purposes. But it was held competent for the railroad company to appropriate lands for piling wood and lumber used in the construction and conduct of the road.

struct and repair the road," it was not authorized, after it had located the road, and was constructing its main road along the north side of a town, to appropriate a temporary right of way for a term of years, along the south side, which was to be used while the main road was being built.[1]

§ 143. **What constitutes a taking.** — In order to lay the foundation of a claim for compensation for the taking of property in the exercise of the right of eminent domain, it is not necessary that there should be an actual or physical taking of the land. Whenever the use of the land is restricted in any way, or some incorporeal hereditament is taken away, which was appurtenant thereto, it constituted as much a taking as if the land itself had been appropriated.[2] The flowing of lands,[3] the diversion of streams,[4] the appropriation of water fronts, on streams where the tide does not ebb and flow,[5] and, likewise, in navigable streams, the condemnation of an exclusive wharfage,[6] are only a few instances of the exercise of the right of eminent domain, in which the property taken is incorporeal. In respect to the appropriation of water fronts, according to the older authorities, if the

[1] Currier *v.* Marietta, etc., R. R. Co., 10 Ohio St. 121.

[2] Pampelly *v.* Green Bay, etc., Co., 13 Wall. 166; Hooker *v.* New Haven, etc., R. R. Co., 14 Conn. 146; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504; Glover *v.* Powell, 10 N. J. Eq. 211; Ashley *v.* Port Huron, 35 Mich. 296; Arimond *v.* Green Bay, etc., Co., 31 Wis. 316.

[3] Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308; Eaton *v.* Boston, etc., R. R. Co., 51 N. H. 504; Brown *v.* Cayuga, etc., R. R. Co., 12 N. Y. 486; Norris *v.* Vt. Cent. R. R. Co., 28 Vt. 99.

[4] Harding *v.* Stanford Water Co., 41 Conn. 87; Proprietors, etc., *v.* Nashua & Lowell R. R. Co., 10 Cush. 388; March *v.* Portsmouth, etc., R. R. Co., 19 N. H. 372; Rome *v.* Addison, 34 N. H. 206; Johnson *v.* Atlantic, etc., R. R. Co., 35 N. H. 569; Haynes *v.* Burlington, 38 Vt. 350; Boughton *v.* Carter, 18 Johns. 405; Baltimore, etc., R. R. Co. *v.* Magender, 34 Md. 79 (6 Am. Rep. 310); Stein *v.* Burden, 24 Ala. 120; Pettigrew *v.* Evansville, 25 Wis. 223.

[5] Varick *v.* Smith, 9 Paige, 547.

[6] Murray *v.* Sharp, 1 Bosw. 539.

stream was a navigable one, that is, one in which the tide ebbed and flowed, and the title to the bed of which was in the State, the appropriation to public uses of the water front was held not to involve any taking of property for which compensation had to be made;[1] and this has also been held to be the rule in reference to those fresh water streams, which are practically navigable, and the title to whose beds is in the State.[2] But these cases have not been followed by later adjudications, so far as they assert the right to take away from the riparian proprietor all access to the navigable stream by and over his land. This right of access to the stream is declared to be an incorporeal hereditament, appurtenant to the abutting land, which cannot be taken away without proper compensation.[3]

The diversion of navigable streams is also a taking of property, for which compensation must be made to the riparian owner. Although the riparian owner has no property in the water, or in the bed of the stream, he has a right to make a reasonable use of it, and since a diversion of the stream will interfere with the reasonable use, perhaps deprive him altogether of its use, compensation must be made to him for this loss, as being a taking of property.[4]

It frequently happens in the experience of municipal life that in order to prevent an accidental fire from becoming a general conflagration, one or more houses which stand in the path of the fire will be destroyed by means of explo-

[1] Gould *v.* Hudson River R. R. Co., 6 N. Y. 522; Pennsylvania R. R. Co. *v.* N. Y., etc., R. R. Co., 23 N. J. Eq. 157; Stevens *v.* Paterson, etc., R. R. Co., 34 N. J. 532.

[2] Tomlin *v.* Dubuque, etc., R. R. Co., 32 Iowa, 106 (7 Am. Rep. 176).

[3] Railway *v.* Renwick, 102 U. S. 180; Yates *v.* Milwaukee, 10 Wall. 497; Chicago, etc., R. R. Co. *v.* Stein, 75 Ill. 41. As to rights of property in highways, see *post.*

[4] People *v.* Canal Appraisers, 13 Wend. 355; Gardner *v.* Newburg, 2 Johns. Ch. 162; Bellinger *v.* N. Y. Central R. R. Co., 23 N. Y. 42; Morgau *v.* King, 35 N. Y. 454; Hatch *v.* Vermont Cent. R. R. Co., 25 Vt. 49; Thunder Bay, etc., Co. *v.* Speechly, 31 Mich. 332; Emporia *v.* Soden, 25 Kan. 588 (37 Am. Rep. 265.)

sives or otherwise, in order to check it. It is never done, except in cases where the destroyed houses would have inevitably been consumed by the fire. The owners of these houses, therefore, have not suffered any loss by their destruction; and on this ground, and on the plea of overruling necessity, such destruction of buildings has been held not to be an appropriation under the right of eminent domain, and no claim for compensation can be made by the owners. And where a municipal officer orders the destruction the municipal corporation is not liable for damages, in the absence of a statute to that effect.[1]

But the consequential or incidental injury to property, resulting from the lawful exercise of an independent right, is never held to be a taking of property in the constitutional sense, where the enjoyment of the right or privilege does not involve an actual interference or disturbance of property rights. "In the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to others in their property or business. This always happens more or less in all rival pursuits, and often where there is nothing of that kind. One mill or one store or school injures another. One's dwelling is undermined, or its lights darkened, or its prospect obscured, and thus materially lessened in value by the erection of other buildings upon lands of other proprietors. One is beset with noise or dust or other inconvenience by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of

[1] Taylor *v.* Plymouth, 8 Met. 462; Ruggles *v.* Nantucket, 11 Cush. 433; Stone *v.* Mayor, etc., of N. Y., 25 Wend. 157; Russell *v.* Mayor, etc., of N. Y., 2 Denio, 461; American Print Works *v.* Lawrence, 21 N. J. 248; American Print Works *v.* Lawrence, 23 N. J. 590; White *v.* Charleston, 1 Hill (S. C.) 571; Keller *v.* Corpus Christi, 50 Texas, 614 (32 Am. Rep. 513); Conwell *v.* Emrie, 2 Ind. 35; Field *v.* Des Moines, 39 Iowa, 575; McDonald *v.* Redwing, 30 Minn. 38; Sirocco *v.* Geary, 3 Cal. 69.

these cases. The thing is lawful in the railroad as much as in the other cases supposed. These public works came too near some and too remote from others. They benefit many and injure some. It is not possible to equalize the advantages and disadvantages. It is so with everything, and always will be. Those most skilled in these matters, even empirics of the most sanguine pretensions, soon find their philosophy at fault in all attempts at equalizing the ills of life. The advantages and disadvantages of a single railway could not be satisfactorily balanced by all of the courts in forty years; hence they would be left, as all other consequential damage and gain are left, to balance and counterbalance themselves as they best can." [1] Thus there is no taking of property, if the owner of a fishery finds it reduced in value in consequence of improvement in the navigation of the river,[2] or a spring is destroyed, or other damage done to riparian land by the same or similar causes,[3] or where the value of adjoining property is affected by a change in the grade of the street.[4] In

[1] Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49; Richardson *v.* Vermont Cent. R. R. Co., 25 Vt. 465; Railroad Company *v.* Richmond, 96 U. S. 521; Davidson *v.* Boston & Maine R. R. Co., 3 Cush. 91; Kennett's Petition, 24 N. H. 135; Hooker *v.* New Haven, etc., R. R. Co., 14 Conn. 146; Gould *v.* Hudson River R. R. Co., 6 N. Y. 522; People *v.* Kerr, 27 N. Y. 188; Zimmerman *v.* Union Canal Co., 1 Watts & S. 846; Monongahela Navigation Co. *v.* Coons, 6 Watts & S. 101; Shrunk *v.* Schuylkill Navigation Co., 14 Serg. & R. 71; Harvey *v.* Lackawanna, etc., R. R. Co., 47 Pa. St. 428; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21; Fuller *v.* Edings, 11 Rich. L. 239; Edings *v.* Seabrook, 12 Rich. L. 504; Alexander *v.* Milwaukee, 16 Wis. 247; Murray *v.* Menefee, 20 Ark. 561.

[2] Shrunk *v.* Schuylkill Navigation Co., 14 Serg. & R. 71. See Parker *v.* Milldam Co., 20 Me. 353 (37 Am. Dec. 56); Commonwealth *v.* Chapin, 5 Pick. 199 (16 Am. Dec. 386); Commonwealth *v.* Look, 108 Mass. 452; Carson *v.* Blazer, 2 Binn. 475 (4 Am. Dec. 463).

[3] Commonwealth *v.* Richter, 1 Pa. St. 467; Green *v.* Swift, 47 Cal. 536; Brown *v.* Cayuga, etc., R. R. Co., 12 N. Y. 486; Davidson *v.* Boston & Maine R. R. Co., 3 Cush. 91; Sprague *v.* Worcester, 13 Gray, 193; Transportation Co. *v.* Chicago, 99 U. S. 635.

[4] Gozzler *v.* Georgetown, 6 Wheat. 593; Smith *v.* Washington, 20 How. (U. S.) 135; Callendar *v.* Marsh, 1 Pick. 418; Bender *v.* Nashua, 17 N. H.

reference to this matter, Mr. Justice Miller has said[1] that the decisions, which have denied the right of compensation "for the consequential injury to the property of an individual from the prosecution of improvement of roads, streets, rivers, and other highways," "have gone to the extreme and limit of sound judicial construction in favor of this principle, and in some cases beyond it; and it remains true that where real estate is actually invaded by superinduced addition of water, earth, sand, or other material, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the constitution."

The greatest difficulty has been experienced in applying these principles to the police regulations of the highways or public streets, in consequence of the variety of uses to which the demands of modern life require them to be put. It has already been explained that, in most of the cities and village communities of this country, the public have only an easement of a right of way over the land used as a road, while the title to the soil remained in the owners, subject

477; Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Green *v.* Reading, 9 Watts, 382; O'Connor *v.* Pittsburg, 18 Pa. St. 187; In re Ridge Street, 29 Pa. St. 391; Matter of Furman Street, 17 Wend. 649; Wilson *v.* Mayor, etc., of New York, 1 Denio, 595; Graves *v.* Otis, 2 Hill, 466; Radcliffe's Ex'rs *v.* Mayor, etc., Brooklyn, 4 N. Y. 195; Pontiac *v.* Carter, 32 Mich. 164; Lafayette *v.* Bush, 19 Ind. 326; Macy *v.* Indianapolis, 17 Ind. 267; Vincennes *v.* Richards, 23 Ind. 381; Roberts *v.* Chicago, 26 Ill. 249; Murphy *v.* Chicago, 29 Ill. 279; Creal *v.* Keokuk, 4 Greene (Iowa), 47. But see, *contra*, Atlanta *v.* Green, 67 Ga. 386; Johnson *v.* City of Parkersburg, 16 W. Va. 402 (37 Am. Rep. 779); McComb *v.* Akron, 15 Ohio, 474 (18 Ohio, 229); Crawford *v.* Delaware, 7 Ohio St. 459. In the last two cases it is held that when the grade of streets is first established, the consequential injury to adjoining property does not constitute a taking of property; but when the grade has once been established, and the adjoining property improved with reference to the existing grade, a change in grade, causing damage, would give rise to a claim for compensation. In O'Brien *v.* St. Paul, 25 Minn. 331, it is held that if the change in the grade of a street deprives the abutting land of its lateral support, it is a taking of property in the exercise of the right of eminent domain.

[1] Pumpelly *v.* Green Bay, etc., Co., 13 Wall. 166, 180.

to the public easement. But in some of the States (notably New York and Indiana), it is provided by statute that the fee of land appropriated for highway purposes shall always be vested in the State.[1] It is clear that any appropriation of the highway to other purposes, which would be inconsistent with, or different from, its use as a street, would be a taking of the private property of the abutting owner, where the soil remained his propery subject to the public easement.[2] But it is not so clear whether such an appropriation of the highway would require the payment of compensation to the abutting owners, in cases where the fee of the road is in the State. If any right of property has been invaded in making the appropriation, compensation must be made, otherwise not. It has been very generally held that the proprietors of adjoining property have, as an easement over the land used as a highway, the right to the free and unobstructed use of the street, and any interference with such use was a taking of property, for which compensation had to be made.[3] In New York, where the fee of the streets is in the State, the earlier cases seemed to deny to the abutting land owner any right of property in the

[1] See *ante*, § 142.

[2] All the cases cited *post*, in connection with the discussion of the right of the State to authorize the construction of horse and steam railways on the highways, support this general proposition. They only differ as to whether the running of these railways is inconsistent with the use of the land as a highway.

[3] Haynes *v.* Thomas, 7 Ind. 38; Protzman *v.* Indianapolis, etc., R. R. Co., 9 Ind. 467; New Albany & Salem R. R. Co. *v.* O'Daily, 13 Ind. 453; Indianapolis R. R. Co. *v.* Smith, 52 Ind. 428; Crawford *v.* Delaware, 7 Ohio St. 459; Street Railway *v.* Cummingsville, 14 Ohio St. 523; State *v.* Cincinnati Gas, etc., Co., 18 Ohio St. 262; Grand Rapids, etc., R. R. Co. *v.* Heisel, 38 Mich. 62 (31 Am. Rep. 306); Pekin *v.* Winkel, 77 Ill. 56; Lackland *v.* North Missouri R. R. Co., 31 Mo. 180; Green *v.* Portland, 32 Me. 431; Brown *v.* Duplessis, 14 La. Ann. 842. Vacation of public highway, not a taking. East St. Louis *v.* O'Flynn, 119 Ill. 200; McGee's Appeal (Pa.), 8 A. 237. But see, *contra*, Milburn *v.* Cedar Rapids, etc., R. R. Co., 12 Iowa, 246; Franz *v.* Railroad Co., 55 Iowa, 107.

street, as a highway, which would be invaded by a different appropriation of the land.[1] But in a late case,[2] it has been held, not only that the abutting land owner has, as appurtenant to his land, an incorporeal right of property in the free and unrestricted use of the street or highway, but also a right to the free passage of light and air over the land used as a street, and any interference with either right would constitute a taking of property, for which compensation must be made. Judge Danforth said, in delivering the opinion of the court, that the land in question was "conceded to be a public street. But besides the right of passage, which the grantee as one of the public acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey — its filing in a public office — the conveyance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves suf-

[1] People *v.* Kerr, 37 Barb. 357; *s. c.* 27 N. Y. 188; Ferring *v.* Irwin, 55 N. Y. 486; Kellinger *v.* Forty-Second St., etc., R. R. Co., 50 N. Y. 206; Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y. 234 (6 Am. Rep. 70); Coster *v.* Mayor, etc., 43 N. Y. 399.

[2] Story *v.* New York Elevated R. R. Co., 90 N. Y. 122, 145, 146. See to same effect Pittsburg Junction R. R. Co. *v.* McCutcheon (Pa.), 7 A. 146 note; Wagner *v.* Elevated R. R. Co., 104 N. Y. 665; Lahr *v.* Elevated R. R. Co., 104 N. Y. 268; Bulton *v.* Short Route Ry. Transfer Co. (Ky.), 4 S. W. 332.

ficient.[1] The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed 'an integral part of the estate' in it. It follows the estate and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient tenement.[2] Nor does it matter that the acts constituting such dedication are those of a municipality. The State even, under similar circumstances, would be bound, and so it was held in the City of Oswego *v.* Oswego Canal Co.:[3] 'In laying out the village plot,' says the court, 'and in selling the building lots, the State acted as the owner and proprietor of the land; and the effect of the survey and sale, in reference to the streets laid down on the map, was the same as if the survey and sale had been made by a single individual.'[4] Lesser corporations can claim no other immunity, and all are bound upon the principle that to retract the promise implied by such conduct, and upon which the purchaser acted, would disappoint his just expectation.

"But what is the extent of this easement? what rights or privileges are secured thereby? Generally it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the

[1] Citing Wyman *v.* Mayor of N. Y., 11 Wend. 487; Trustees of Watertown *v.* Cowen, 4 Paige, 510.

[2] Citing Child *v.* Chappell, 9 N. Y. 246; Hills *v.* Miller, 3 Paige, 256; Trustees of Watertown *v.* Cowen, 4 Paige, 514.

[3] 6 N. Y. 257.

[4] It is a fact, at least in the more modern of our cities, that the public streets were originally indirect dedications by the owner to the public, by laying out a plat, and selling lots, bounded by certain streets, set forth in the plat. The sale of the lots imposed upon the land, over which the street was laid out, at least as against the owner of the land, an easement that the land shall be forever kept open as a street for the use of the lot owners. And the subsequent acceptance by the public of the street so dedicated can certainly make no change, in this regard, in the rights of the lot owners.

open way. The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This, in effect, was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. In this case, it is found by the trial court, in substance, that the structure proposed by the defendant,[1] and intended for the street opposite to the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse and thus work to his injury. In doing this thing, the defendant will take his property as much as if it took the tenement itself. Without air and light, it would be of little value. Its profitable management is secured by adjusting it in reference to the right obtained by his grantor over the adjoining property. The elements of light and air are both to be derived from the space over the land, on the surface of which the street is constructed, and which is made servient for that purpose. He therefore has an interest in that land, and when it is sought to close it, or any part of it, above the surface of the street, so that light is in any measure to his injury prevented, that interest is to be taken, and one whose lot, acquired as this was, is directly dependent upon it for a supply, becomes a party interested and entitled, not only to be heard, but to compensation." [2]

[1] A railroad elevated fifteen feet above the surface.

[2] In a strong dissenting opinion, Judge Earl said: "If the plaintiff has an unqualified private easement in Front Street for light and air and for access to his lot, then such easement cannot be taken or destroyed without compensation to him. (Arnold *v.* Hudson River R. R. Co., 55 N. Y. 661.) But whatever right an abutter, as such, has in the street is subject to the paramount authority of the State to regulate and control the street, for all the purposes of a street, and to make it more

It is reasonable for us, therefore, to conclude that whether the public owns the fee in the road-bed or only an easement to be used as a public way, in either case there is an interest in the road-bed left in the abutting owner, which might be affected by an appropriation of the street or road to other purposes, but the character of the private interest changes with the nature of the public interest. Where the fee is in the public, the abutting proprietor has an incorporeal right to the use of the highway as such, and, if the New York

suitable for the wants and convenience of the public. The grade of a street may, under authority of law, be changed and thus great damage may be done to an abutter. The street may be cut down in front of his lot so that he is deprived of all feasible access to it, and so that the walls of his house may fall into the street, and yet he will be entitled to no compensation (Radcliff's Ex'rs *v.* The Mayor, etc., 7 N. Y. 195; O'Connor *v.* Pittsburg, 18 Pa. St. 187; Callendar *v.* Marsh, 1 Pick. 418); and so the street may be raised in front of his house so that travelers can look into his windows and he can have access to his house only through the roof or upper stories, and all light and air will be shut away, and yet he would be without any remedy. The legislature may prescribe how streets shall be used, as such, by limiting the use of some streets to pedestrians or omnibuses, or carriages or drays, or by allowing them to be occupied under proper regulations for the sale of hay, wood or other produce. It may authorize shade trees to be planted in them, which will to some extent shut out the light and air from the adjoining houses. Streets cannot be confined to the same use to which they were devoted when first opened. They were opened for streets in a city and may be used in any way the increasing needs of a growing city may require. They may be paved; sidewalks may be built; sewer, water and gas pipes may be laid; lamp-posts may be erected, and omnibuses with their noisy rattle over stone pavements, and other new and strange vehicles may be authorized to use them. All these things may be done, and they are still streets, and used as such. Streets are for the passage and transportation of passengers and property. Suppose the legislature should conclude that to relieve Broadway in the city of New York from its burden of travel and traffic it was necessary to have an underground street below the same; can its authority to authorize its construction be doubted? And for the same purpose could it not authorize a way to be made fifteen feet above Broadway for the use of pedestrians? Where the streets become so crowded with vehicles that it is inconvenient and dangerous for pedestrians to cross from one side to another, can it be doubted that the legislature could authorize them to be bridged, so that pedestrians could pass over them, and that it could do this with-

case [1] will be fully indorsed by subsequent adjudication, to the free passage of light and air over the street. If the fee is in the abutting land owner, the bed of the road is his property, subject only to the public easement, that it shall be left open for use as a highway. The abutting land owner may do anything with the land that is not inconsistent with the full enjoyment of the right of way by the public. Thus, the private owner has a right to plant trees in the street, to contruct cellars extending to the middle of the street, and to depasture his cattle in the street in front of his own land, where the right has not been taken away by police regulations in the interest of the public. And a law, which granted to another the right of pasturage in such a street or road, would operate as an exercise of the right of eminent domain, and constitute a taking of property.[2] The Supreme Court of the United States has held that "on the general question as to the rights of the public in a city street, we cannot see any material difference in principle

out compensation to the abutting owners, whose light and air and access might to some extent be interfered with? These improvements would not be a destruction of or a departure from the use to which the land was dedicated when the street was opened; but they would render the street more useful for the very purpose for which it was made, to wit: travel and transportation. If by these improvements the abutting owners were injured, they would have no constitutional right to compensation, for the reason that no property would be merely consequential. And if the public authorities could make these improvements, then the legislature could undoubtedly authorize them to be made by *quasi*-public corporations, organized for the purpose, as it can authorize plank-road and turnpike companies to take possession of highways and take toll for those who use them." (pp. 186–188.)

[1] Story *v.* N. Y. Elevated R. R. Co., *supra.*

[2] Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; Woodruff *v.* Neal, 28 Conn. 165. In Ohio, by an ancient custom, the right of pasturage in the public highways was held to be in the public. Kerwhacker *v.* Cleveland, etc., R. R. Co., 3 Ohio St. 172. In Adams *v.* Rivers, 11 Barb. 390, it was held that trespass would lie in favor of the abutting proprietor and against one who stood in the public highway and abused the proprietor, on the ground that he was there without license, and using the land for other purposes than as a highway.

with regard to the extent of those rights, whether the fee is in the public or in the adjacent land owner, or in some third person. In either case, the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas-pipes and the like."[1] It may be reasonable to hold, at the present day, that the use of the road-bed for the laying of water, gas, and sewer pipes, was contemplated in the original condemnation of the land for use as a highway, and was considered in the estimation of damages; but it is altogether inconsistent with reason and the nature of things to assert as a general proposition, that the rights of the public in the streets are the same, whether the fee is in the public or is private property.[2]

It is more difficult at times to answer satisfactorily the question of fact, whether a particular use of a street is inconsistent with its use as a highway, and the question has oftenest been applied to the construction of turnpikes, horse and steam railways along the highway.

The only essential difference between an ordinary highway and a turnpike is that the former is kept in repair by the public by means of taxation, general or special, and

[1] Barney *v.* Keokuk, 94 U. S. 324, 440.

[2] Judge Cooley says: "The practical difference in the cases is, that when the fee is taken, the possession of the original owner is excluded; and in the case of city streets where there is occasion to devote them to many other purposes besides those of passage, but nevertheless not inconsistent, such as for the laying of water and gas-pipes, and the construction of sewers, this exclusion of any private right of occupation is important, and will sometimes save controversies and litigation. But to say that when a man has declared a dedication for a particular use, under a statute which makes a dedication the gift of a fee, he thereby makes it liable to be appropriated to other purposes, when the same could not be done if a perpetual easement had been dedicated, seems to be basing important distinctions upon a difference which after all is more technical than real, and which in my view does not affect the distinction made." Cooley Const. Lim. 687*n*. See Bloomfield, etc., Co. *v.* Calkins, 62 N. Y. 386.

the public generally may use it without charge; while the turnpike is owned and conducted by a private corporation, and a toll is required of all who use it. Since in both cases the public have an indefeasible right to use the road, the establishment of a turnpike over the common highway is not an appropriation of the street to a different purpose. The payment of toll is only an equivalent of the taxation and the highway labor, which in the case of an ordinary highway might be required of the abutting land owner for keeping the road in repair.[1]

The question, whether the construction of a railroad along a highway is such an appropriation of the land to different uses as will support the claim of compensation of the abutting land owners, is very hard to answer satisfactorily. The decisions on the subject are at variance, and the grounds upon which the decisions are placed are not always the same, and sometimes confusing. In some of the cases, great stress is laid upon the fact, that the fee is or is not in the public.[2] But the authorities and facts will only justify this distinction: If the new use of the highway is inconsistent with its

[1] "When a common highway is made a turnpike or a plank-road, upon which tolls are collected, there is much reason for holding that the owner of the soil is not entitled to any further compensation. The turnpike or the plank-road is still an avenue for public travel, subject to be used in the same manner as the ordinary highway was before, and, if properly constructed, is generally expected to increase rather than diminish the value of property along its line; and though the adjoining proprietors are required to pay toll, they are supposed to be, and generally are fully compensated for this burden by the increased excellence of the road, and by their exemption from highway labor upon it." Cooley Const. Lim. 677, 678. See Commonwealth *v.* Wilkinson, 16 Pick. 175 (24 Am. Dec. 624); Murray *v.* County Commissioners, 12 Met. 455; Benedict *v.* Goit, 3 Barb. 459; Wright *v.* Cartey, 27 N. J. 76; State *v.* Laverack, 34 N. J. 201; Douglas *v.* Turnpike Co., 22 Md. 219; Chagrin Falls, etc., Plank-road Co. *v.* Cane, 2 Ohio St. 419; Bagg *v.* Detroit, 5 Mich. 336. But see Williams *v.* Natural Bridge Plank-road Co., 21 Mo. 580.

[2] See Moses *v.* Pittsburg, etc., R. R. Co., 21 Ill. 516, 522; People *v.* Kerr, 37 Barb. 357; *s. c.* 27 N. Y. 188; Millburn *v.* Cedar Rapids, etc., R. R. Co., 12 Iowa, 246; Franz *v.* Railroad Co., 55 Iowa, 107, and the other cases cited in this connection.

character as a highway, where the fee is in the abutting land owner, it is a taking of property for which compensation must be made, whatever incidental benefits or injuries the land owner may sustain from the new use; and even if he has sustained no injury whatever, for incidental injuries never constitute a taking of property in the law of eminent domain. But if the fee is in the public, any use of the highway will not operate as a taking of the property of the abutting land owner, which does not interfere with his ordinary use of the street.[1] Probably this distinction might assist in explaining away many of the differences of opinion, which now make the cases on this subject confusing and perplexing. Where the fee is not in the public, it seems to be the opinion of an overwhelming majority of the cases, that the construction of an ordinary steam railway along a public street was a taking of the property of the owners of the fee for a different use, for which compensation had to be made. "It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With its single track, and particularly if the cars used upon it were propelled by horse-power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this question cannot affect the question of right of property, or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement, and would not affect the principle, that the use of a street for the purposes of a railroad imposed upon it a new burden."[2]

[1] See Protzman *v.* Indianapolis, etc., R. R. Co., 9 Ind. 467; New Albany, etc., R. R. Co. *v.* O'Daily, 13 Ind. 353; Crawford *v.* Delaware, 7 Ohio St. 459; Street Railway *v.* Cumminsville, 14 Ohio St. 541.

[2] Wager *v.* Troy Union R. R. Co., 25 N. Y. 526, 532. See inhabitants of Springfield *v.* Conn. River R. R. Co., 4 Cush. 71; Imlay *v.* Union Branch R. R. Co., 26 Conn. 249; Presbyterian Society, etc., *v.* Auburn, etc., R. R. Co., 3 Hill, 567; Williams *v.* N. Y. Central R. R. Co., 16 N. Y. 97; Car-

In deciding that the construction of an ordinary railroad as a public street or highway was a new taking of the property of the owner of the fee, the Supreme Court of Connecticut presented a very strong argument in favor of the proposition, which is as follows: "When land is condemned for a special purpose on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not convertible into a common. As the property is not taken, but the use only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion. But it is contended that land once taken and still held for highway purposes may be used for a railway without exceeding the limits of the easement already acquired by the public. If this is true, if the new use of the land is within the scope of the original sequestration or dedication, it would follow that the railway privileges are not an encroachment on the estate remaining in the owner of the soil, and that the new mode of enjoying the public easement will not enable him right-

penter *v.* Oswego, etc., R. R. Co., 24 N. Y. 655; Mahon *v.* N. Y. Central R. R. Co., 24 N. Y. 658; Starr *v.* Camden & Atlantic R. R. Co., 24 N. J. 592; Central R. R. Co. *v.* Hetfield, 29 N. J. 206; So. Ca. R. R. Co. *v.* Steiner, 44 Ga. 546; Donnaher's Case, 16 Miss. 649; Cox *v.* Louisville, etc., R. R. Co., 48 Ind. 178; Schurmeier *v.* St. Paul, etc., R. R. Co., 10 Minn. 82; Gray *v.* First Division, etc., 13 Minn. 315; Ford *v.* Chicago, etc., R. R. Co., 14 Wis. 609, 616; Pomeroy *v.* Chicago, etc., R. R. Co., 16 Wis. 640; Cox *v.* Louisville, etc., R. R. Co., 48 Ind. 178; Cosby *v.* Railroad Co., 10 Bush (Ky.), 288; Railroad Co. *v.* Combs, 10 Bush, 382 (19 Am. Rep. 67); 2 Dillon Municipal Corp., § 725. See *contra*, Mifflin *v.* Railroad Co., 16 Pa. St. 182; Cases of Phila. & Trenton R. R. Co., 6 Whart. 25 (36 Am. Dec. 202); Struthers *v.* Railroad Co., 87 Pa. St. 282; Lexington, etc., R. R. Co. *v.* Applegate, 8 Dana, 289 (33 Am. Dec. 497). See, also, West Jersey R. R. Co. *v.* Cape May, etc., Co., 34 N. J. Eq. 164; Com. *v.* Erie, etc., R. R. Co., 27 Pa. St. 339; Snyder *v.* Pennsylvania R. R. Co., 55 Pa. St. 340; Peddicord *v.* Baltimore, etc., R. R. Co., 34 Md. 463; Wolfe *v.* Covington, etc., R. R. Co., 15 B. Mon. 404; Houston, etc., R. R. Co. *v.* Odum, 53 Tex. 343.

fully to assert a claim to damages therefor. On the contrary, if the true intent and efficacy of the original condemnation was not to subject the land to such a burden as will be imposed upon it when it is confiscated to the uses and control of a corporation, it cannot be denied that in the latter case the estate of the owner of the soil is injuriously affected by the supervening servitude; that his rights are abridged, and that in a legal sense his land is again taken for public uses. Thus it appears that the court have simply to decide whether there is such an identity between a highway and a railway, that statutes conferring a right to establish the former include an authority to construct the latter.

"The term 'public highway,' as employed in such of our statutes as convey the right of eminent domain, has certainly a limited import. Although, as suggested at the bar, a navigable river or a canal is, in some sense, a public highway, yet an easement assumed under the name of a highway would not enable the public to convert a street into a canal. The highway, in the true meaning of the word, would be destroyed. But as no such destruction of the highway is necessarily involved in the location of a railway track upon it, we are pressed to establish the legal proposition that a highway, such as is referred to in these statutes, means, or at least comprehends, a railroad. Such a construction is possible only when it is made to appear that there is a substantial practical or technical identity between the uses of land for highway and for railway purposes. No one can fail to see that the terms 'railway' and 'highway' are not convertible, or that the two uses, practically considered, although analogous, are not identical. Land, as ordinarily appropriated by a railroad company, is inconvenient and even impassible to those who would use it as a common highway. Such a corporation does not hold itself bound to make or keep its embankments and bridges in a condition which will facilitate the *transitus* of such vehicles as ply over an ordinary road.

"A practical dissimilarity obviously exists between a railway and a common highway, and is recognized as the basis of a legal distinction between them. It is so recognized on a large scale when railway privileges are sought from legislative bodies, and granted by them. If the terms 'highway' and 'railway' are synonymous, or if one of them includes the other by legal implication, no act would be more superfluous than to require or to grant authority to construct railways over localities already occupied as highways. If a legal identity does not subsist between a highway and a railway, it is illogical to argue that, because a railway may be so constructed as not to interfere with the ordinary uses of a highway, and so as to be consistent with the highway right already existing, therefore such a new use is included within the old use. It might as well be urged that if a common or a canal, laid out over the route of a public road, could be so arranged as to leave an ample roadway for vehicles and passengers on foot, the land should be held to be originally condemned for a canal or a common, as properly incident to the highway use.

"There is an important practical reason why courts should be slow to recognize a legal identity between the two uses referred to. They are by no means the same thing to the proprietor whose land is taken; on the contrary, they suggest widely different standards of compensation. One can readily conceive of cases, where the value of real estate would be directly enhanced by the opening of a highway through it; while its confiscation for a railway at the same or a subsequent time would be a gross injury to the estate, and a total subversion of the mode of enjoyment expected by the owner, when he yielded his private rights to the public exigency. But essential distinctions also exist between highway and railway powers, as conferred by statute — distinctions which are founded in the very nature of the powers themselves. In the case of the highway, the statute provides that, after the observance of certain legal

forms, the locality in question shall be forever subservient to the right of every individual in the community to pass over the thoroughfare so created at all times. This right involves the important implication that he shall so use the privilege as to leave the privilege of all others as unobstructed as his own, and that he is therefore to use the road in the manner in which such roads are ordinarily used, with such vehicles as will not obstruct or require the destruction of the ordinary modes of travel thereon. He is not authorized to lay down a railway track, and run his own locomotive and car upon it.

"No one ever thought of regarding highway acts as conferring railway privileges, involving a right in every individual, not only to break up ordinary travel, but also to exact tolls from the public for the privilege of using the peculiar conveyances adapted to a railroad. If a right of this description is not conferred when a highway is authorized by law, it is idle to pretend that any proprietor is divested of such a right. It would seem that, under such circumstances, the true construction of highway laws could hardly be debatable, and that the absence of legal identity between the two uses of which we speak was patent and entire.

"Again, no argument or illustration can strengthen the self-evident proposition that, when a railway is authorized over a public highway, a right is created against the proprietor of the fee, in favor of a person, or artificial person, to whom he bore no legal relation whatever. It is understood that when such an easement is sought or bestowed, a new and independent right will accrue to the railroad corporation as against the owner of the soil, and that, without any reference to the existence of the highway, his land will forever stand charged with the accruing servitude. Accordingly, if such a highway were to be discontinued, according to the legal forms prescribed for that purpose, the railroad corporation would still insist upon the express

and independent grant of an easement to itself, enabling it to maintain its own road on the site of the abandoned highway. We are of opinion, therefore, as was distinctly intimated by this court, in a former case[1] that, to subject the owner of the soil of a highway to a further appropriation of his land to railway uses is the imposition of a new servitude upon his estate, and is an act demanding the compensation which the law awards when land is taken for public purposes.'" The dissimilarity of highways and railways cannot be more strikingly presented than by a consideration of the numerous safeguards that are thought necessary to be thrown around the public, when a railroad crosses a highway. The bells must be rung, the whistle must be blown, the speed must be slackened, and very often bars are laid across the highway, so that vehicles and foot passengers cannot attempt to cross the track while the train is passing. How much greater would be the inconvenience to the public if a railroad track was laid along the highway, instead of across it.

But where the fee of the highway is in the public, the cases pretty generally hold that the establishment of a railroad along a highway is not such a taking of property of the adjoining land owner as will require the payment of compensation.[2] It cannot be doubted that in no case

[1] See opinion of Hinman, J., in Nicholson *v.* N. Y., etc., R. R. Co , 22 Conn. 74, 85.

[2] Milburn *v.* Cedar Rapids, etc., R. R. Co., 12 Iowa, 246; Clinton *v.* Cedar Rapids, etc., R. R. Co., 24 Iowa, 455; Franz *v.* Railroad Co , 35 Iowa, 107; Grand Rapids, etc., R. R. Co. *v.* Heisel, 38 Mich. 62 (31 Am. Rep. 306); Grand Rapids, etc., R. R. Co. *v.* Heisel, 47 Mich. 393; Harrison *v.* New Orleans, etc., R. R. Co., 34 La. Ann. 462 (44 Am. Rep. 438); Protzman *v.* Indianapolis, etc., R. R. Co., 9 Ind. 467; New Albany, etc., R. R. Co. *v.* O'Daily, 13 Ind. 353; Chicago, etc., R. R. Co. *v.* Joliet, 79 Ill. 25; Moses *v.* Pittsburg, etc., R R. Co., 21 Ill. 516, 522. In this last case, Caton, C. J., said: "By the city charter, the common council is vested with the exclusive control and regulation of the streets of the city, the fee simple title to which we have already decided is vested in the municipal corporation. The city charter also empowers the common coun-

does the consequential depreciation in value of adjoining property, as a result of the construction of a steam railway along the street, constitute a taking of property which requires a payment of compensation, any more than the ordinary and reasonable exercise of any right gives rise to

cil to direct and control the location of railroad tracks within the city. In granting this permission to locate the track in Beach Street, the common council acted under an express power granted by the legislature. So that the defendant has all the right which both the legislature and the common council could give it, to occupy the street with its track. But the complainant assumes higher ground, and claims that any use of the street, even under the authority of the legislature and the common council, which tends to deteriorate the value of his property on the street, is a violation of that fundamental law which forbids private property to be taken for public use without just compensation. This is manifestly an erroneous view of the constitutional guaranty thus invoked. It must necessarily happen that streets will be used for various legitimate purposes, which will, to a greater or less extent, discommode persons residing or doing business upon them, and just to that extent damage their property; and yet such damage is incident to all city property, and for it a party can claim no remedy. The common council may appoint certain localities, where hacks and drays shall stand waiting for employment, or where wagons loaded with hay or wood, or other commodities, shall stand waiting for purchasers. This may drive customers away from shops or stores in the vicinity, and yet there is no remedy for the damage. A street is made for the passage of persons and property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be the best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled the streets? For the same reason camels must be kept out, although they might be profitably employed. Some fancy horse or timid lady might be frightened by such uncouth objects. Or is the objection not in the motive-power used, but because the cars are larger than were formerly used, and run upon iron, and confined to a given track in the street? Then street railroads must not be admitted; they have large carriages which run on iron rails, and are confined to a given track. Their momentum is great, and

liability for incidental injuries to others. The appropriation of a highway to other purposes must interfere with some positive right of property, in order that it may be considered a taking of property. Where the public does not own the fee, any other and different use of the highway would be a taking, whatever effect it may have upon the adjoining property, as has been already fully explained, for there would be a fresh appropriation of the property of the owners of the fee. But when the fee is in the State, the adjoining land owner has only an easement in the street, which entitles him to a reasonable enjoyment of it as a street, and an appropriation of it to other purposes, for example, for the construction of a steam railway, will constitute a taking of the property of the abutting proprietor, only when his reasonable enjoyment of the street as such is denied to him. The noise, smoke, etc., do not involve any taking of property, however much it may depreciate the value and

may do damage to ordinary vehicles or foot passengers. Indeed we may suppose or assume that streets occupied by them are not so pleasant for other carriages or so desirable for residence or business stands, as if not thus occupied. But for this reason the property owners along the street cannot expect to stop such improvements. The convenience of those who live at a greater distance from the center of a city requires the use of such improvements, and for their benefit the owners of property upon the street must submit to the burden, when the common council determine that the public good requires it. Cars upon street railroads are now generally, if not universally, propelled by horses; but who can say how long it will be before it will be found safe and profitable to propel them with steam, or some other power besides horses? Should we say that this road should be enjoined, we could advance no reason for it which would not apply with equal force to street railroads; so that consistency would require that we should stop all. Nor would the evil which would result from the rule we must lay down stop here. We must prohibit every use of a street which discommodes those who reside or do business upon it, because their property will else be damaged. This question has been presented in other States, and in some instances, where the public have only an easement of the street, and the owner of the adjoining property still holds the fee in the street, it has been sustained; but the weight of authority, and certainly, in our apprehension, all sound reasoning is the other way."

the desirability of the adjoining property. This would seem to be the better doctrine, and such is the opinion of the Indiana courts.[1]

But the courts are almost unanimously of the opinion that the appropriation of the street to the use of an ordinary horse railway, designed to convey passengers and property from one part of a city to another, is not a new taking of property, for which compensation must be made, whether the fee is in the State or in the abutting land owner. The use of the highway by a horse car company is held to be consistent with its use as a highway, and to constitute no interference with the reasonable enjoyment of the adjoining property-owner.[2] But the abutting land owner is only entitled to a reasonable use of the street as such, and the infliction on him of a mere inconvenience in the use of the street, by the construction of a street railway, will not constitute a taking. Thus, it was held in New York, that the construction of a street railway, so near to the sidewalk as not to leave space enough for the standing of vehicles between the track and the sidewalk, was a taking of prop-

[1] Protzman *v.* Indianapolis, etc., R. R. Co., 9 Ind. 467; New Albany, etc., R. R. Co. *v.* O'Daily, 12 Ind. 551; *s. c.* 13 Ind. 353. See, also, Street Railway *v.* Cumminsville, 14 Ohio St. 523; Grand Rapids, etc., R. R. Co., 38 Mich. 62 (31 Am. Rep. 306); *s. c.* 47 Mich. 393.

[2] For cases, in which the fee was in the adjoining proprietor, see Attorney-General *v.* Metropolitan R. R. Co., 125 Mass. 515 (28 Am. Rep. 264); Commonwealth *v.* Temple, 14 Gray, 75; Elliott *v.* Fairhaven, etc., R. R. Co., 32 Conn. 579; Hinchman *v.* Railroad Co., 17 N. J. Eq. 75; *s. c.* 20 N. J. Eq. 360; City Railroad Co. *v.* City Railroad Co., 20 N. J. Eq. 61; Street Railway *v.* Cumminsville, 14 Ohio St. 523; Hobart *v.* Milwaukee City R. R. Co., 27 Wis. 194 (9 Am. Rep. 461). In Craig *v.* Railroad Co., 39 Barb. 449; *s. c.* 39 N. Y. 404; Wager *v.* Railroad Co., 25 N. Y. 526, it was held that there was no difference between the horse and steam railways. In both cases, there must be a payment of compensation for a new taking of property from the owners of the fee. For cases, in which the fee was in the public, see People *v.* Kerr, 27 N. Y. 188; Kellinger *v.* Street Railroad Co., 50 N. Y. 206; Metropolitan R. R. Co. *v.* Quincy R. R. Co., 12 Allen, 262; Street Railway *v.* Cumminsville, 14 Ohio St. 523; Chicago *v.* Evans, 24 Ill. 52; Hess *v.* Baltimore, etc., Railway Co., 52 Md. 242 (36 Am. Rep. 371.)

erty in the constitutional sense.[1] And the same opinion was expressed in Wisconsin concerning a street railway, whose tracks prevented the owner of a store from having his drays stand transversely to the sidewalk, while unloading goods.[2] While the running of a street railway does not ordinarily interfere with the reasonable enjoyment of the street by the adjoining land owners, still it might, under peculiar circumstances, interfere very seriously with the ordinary use of the street, as where the street is very narrow, and at the same time a great business thoroughfare; and whenever that happens, the construction of the railway would constitute a taking of property, for which compensation can be demanded. Mr. Cooley seems to think that under such circumstances, the property owner would, in the light of the authorities, be without a remedy.[3] But while the proprietor of the adjoining property may be incommoded to some extent by the construction and maintenance of a street railway, without entitling him to compensation, his complete exclusion from the ordinary use of the street, or an extraordinary and unreasonable interference with such use, would support a claim for compensation, as being a taking of property in the exercise of the right of eminent domain. Such, at least, appears to us to be a reasonable deduction from the authorities, which hold that any interruption of the reasonable use of the streets by the abutting land owner will constitute a taking of property.

It has sometimes happened that land, which had been appropriated for the opening of a street, is afterwards used for the erection of a market, or public scale, etc. This cannot be done in any case without payment of compensation, because the use of the land as a market is inconsistent and interferes with its use as a street.[4]

[1] Kellinger *v.* Street R. R. Co., 50 N. Y. 206; People *v.* Kerr, 27 N. Y. 188.
[2] Hobart *v.* Milwaukee City R. R. Co., 27 Wis. 194 (9 Am. Rep. 461).
[3] Cooley Const. Lim. 683.
[4] State *v.* Laverack, 34 N. J. 201; State *v.* Mayor, etc., of Mobile, 5

§ 144. **Compensation, how ascertained.** — It does not fall properly within the scientific scope of a work on Police Power to enter into a detailed account of the rule and proceedings for the ascertainment and measurement of the compensation, that is to be paid to one whose land is taken away from him in the exercise of eminent domain. That subject belongs more properly to a work on practice or on damages. But there are certain constitutional principles involved in the subject, which will require a cursory consideration.

While the condemnation of land for public purposes is in no sense a judicial act, the determination of the amount of compensation is a judicial act, which requires, for a final adjudication, a trial of the facts before a court, with a due observance of all those constitutional safeguards that are thrown around private rights, for their protection against arbitrary or tyrannical infringements. The legislature cannot fix the limits of compensation, nor can it be done in any *ex parte* proceeding. But a jury is not necessary, unless the constitution expressly provides for a jury trial.[1]

Another question relates to the time when the compensation should be made. According to the constitutions of many of the States, the payment of compensation must always precede or accompany the condemnation of the land. But where such constitutional provisions do prevail, it is held

Port. 279 (30 Am. Dec. 564); Angell on Highways, § 243, *et seq.*; Barney *v.* Keokuk, 94 U. S. 324.

[1] Charles River Bridge *v.* Warren Bridge, 7 Pick. 344; *s. c.* 11 Pet. 420, 571; People *v.* Kniskern, 54 N. Y. 52; Petition of Mt. Washington Co., 35 N. H. 134; Ligat *v.* Commonwealth, 19 Pa. St. 456, 460; People *v.* Tallman, 36 Barb. 222; Clark *v.* Miller, 54 N. Y. 528; Baltimore, etc., R. R. Co. *v.* Pittsburg, etc., R. R. Co., 17 W. Va. 812; Power's Appeal, 29 Mich. 504; Lamb *v.* Lane, 4 Ohio St. 167; Hood *v.* Finch, 8 Wis. 381; Boonville *v.* Ormrod, 26 Mo. 193; Dickey *v.* Tennison, 27 Mo. 373; Rich *v.* Chicago, 59 Ill. 286; Cook *v.* South Park Com., 61 Ill. 115; Ames *v.* Lake Superior, etc., R. R. Co., 21 Minn. 241. See Putnam *v.* Douglass Co., 6 Ore. 378 (25 Am. Rep. 527); Conn. River R. R. Co. *v.* County Commissioners, 127 Mass. 50 (34 Am. Rep. 338).

to be no violation of them for public officers, or the officers and agents of the corporation, in whose favor the right of eminent domain is to be exercised, to enter upon the land, before the payment of compensation, for the purpose of surveying and selecting the land for condemnation.[1] In the absence, however, of such a constitutional requirement, at least in the case of the appropriation of land by the State or municipal authorities, it is not necessary to provide for the payment of compensation before the appropriation. It is sufficient, if an easy remedy is provided for the recovery of the compensation by the land owner at his own instance.[2]

[1] Cushman *v.* Smith, 34 Me. 247; Nichols *v.* Somerset, etc., R. R. Co., 43 Me. 356; Bloodgood *v.* Mohawk, etc., R. R. Co., 14 Wend. 51; *s. c.* 18 Wend. 9; State *v.* Seymour, 35 N. J. 47; Walther *v.* Warner, 25 Mo. 277; Fox *v.* W. P. R. R. Co., 31 Cal. 538; Pa. R. R. Co. *v.* Angel (N. J.), 7 A. 432.

[2] Charlestown Branch R. R. Co. *v.* Middlesex, 7 Met. 78; Haverhill Bridge Proprietors *v.* County Commissioners, 103 Mass. 120 (4 Am. Rep. 518); Conn. River R. R. Co. *v.* Com., 127 Mass. 50. (34 Am. Rep. 338); Talbot *v.* Hudson, 16 Gray, 417; Ash *v.* Cummings, 50 N. H. 591; Orr v. Quinby, 54 N. H. 590; Calkin *v.* Baldwin, 4 Wend. 667 (21 Am. Dec. 168); Bloodgood *v.* Mohawk, etc., R. R. Co., 18 Wend. 9; Gardner *v.* Newburg, 2 Johns. Ch. 162 (7 Am. Dec. 526); Rexford *v.* Knight, 11 N. Y. 308; Chapman *v.* Gates, 54 N. Y. 132; Hamersly *v.* New York, 56 N. Y. 533; Loweree *v.* Newark, 38 N. J. 151; Long *v.* Fuller, 68 Pa. St. 170; Callison *v.* Hedrick, 15 Gratt. 244; Southwestern R. R. Co. *v.* Telegraph Co., 46 Ga. 43; Buffalo, etc., R. R. Co. *v.* Ferris, 26 Tex. 588; White *v.* Nashville, etc., R. R. Co., 7 Heisk. 518; Simms *v.* Railroad Co., 12 Heisk. 621; Taylor *v.* Marcy, 25 Ill. 518; People *v.* Green, 3 Mich. 496; Brock *v.* Hishen, 40 Wis. 674; State *v.* Messenger, 27 Minn. 119; Harper *v.* Richardson, 22 Cal. 251. But the land owner must be able to institute the suit for the recovery of the compensation of his own motion, and without the interposition of some State officer. Shepherdson *v.* Milwaukee, etc., R. R. Co., 6 Wis. 605; Powers *v.* Bears, 12 Wis. 213. In the absence of a statutory provision for compensation, the land owner may resort to his common-law remedy. Hooker *v.* Haven, etc., Co., 16 Conn. 146 (36 Am. Dec. 477). It is not unconstitutional, after providing a proper remedy for the recovery of the compensation, to limit the time in which the remedy may be pursued. Charleston Branch R. R. Co. *v.* Middlesex, 7 Met. 78; Rexford *v.* Knight, 11 N. Y. 308; Callison *v.* Hedrick, 15 Gratt. 244; Cupp *v.* Commissioners of Seneca, 19 Ohio St. 173; People *v.* Green, 3 Mich. 496; Taylor *v.* Marcy, 25 Ill. 518; Gilmer *v.* Lime Point, 18 Cal. 229. But where the property

It has been held that some provision for the recovery of compensation must be made in order that the constitutionality of the law condemning land may be sustained.[1] But this can hardly be taken as an emphatic determination that such is a constitutional requirement in the absence of an express provision to that effect. It is rather a consideration of what provisions the legislature ought to make for the protection of the land owner, so that he should not be left to the mercy of a possibly dishonest or bankrupt corporation, and run the risk of losing both his land and his money.[2] And most of the State statutes do make such provisions.

§ 145. **Regulation of the use of lands — What is a nuisance?** — The reasonable enjoyment of one's real estate is certainly a vested right, which cannot be interfered with or limited arbitrarily. The constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private

is taken by a private corporation, instead of by the State, an inclination is manifested by some of the authorities to hold it necessary on general principles that payment of compensation precede or accompany the condemnation. "The settled and fundamental doctrine is, that government has no right to take private property for public purposes, without giving just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time with the actual exercise of the right of eminent domain." Kent, Chancellor, in 2 Kent, 329, note. See, also, to the same effect, Loweree *v.* Newark, 38 N. J. 151; State *v.* Graves, 19 Md. 351; Dronberger *v.* Reed, 11 Ind. 420; Shepherdson *v.* Milwaukee, etc., R. R. Co., 6 Wis. 605; Powers *v.* Bears, 12 Wis. 213.

[1] State *v.* Chicago, etc., R. R. Co. (Minn.), 31 N. W. 365.

[2] See Ash *v.* Cummings, 50 N. H. 591; Memphis & Charleston R. R. Co. *v.* Payne, 37 Miss. 700; Walther *v.* Warner, 25 Mo. 277; Carr *v.* Georgia R. R. Co., 1 Ga. 524; Southwestern R. R. Co. *v.* Telegraph Co., 46 Ga. 43; Henry *v.* Dubuque, etc., R. R. Co., 10 Iowa, 540; Curran *v.* Shattuck, 24 Cal. 427.

property without due process of law, which is inhibited by the constitutions. But it is not every use which comes within this constitutional protection. One has a vested right to only a reasonable use of one's lands. It is not difficult to find the rule which determines the limitations upon the lawful ways or manner of using lands. It is the rule, which furnishes the solution of every problem in the law of police power, and which is comprehended in the legal maxim, *sic utere tuo, ut alienum non lædas.* One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's lands to the hurt or annoyance of another is a nuisance, and may be prohibited. At common law that is a nuisance, which causes personal discomfort or injury to health to an unusual degree. As it has been expressed in a preceding section,[1] the right of personal security against acts, which will cause injury to health or great bodily discomfort, cannot be made absolute in organized society. It must yield to the reasonable demands of trade, commerce and other great interests of society. While the State cannot arbitrarily violate the right of personal security to health by the unlimited authorization of acts which do harm to health, or render one's residence less comfortable, there is involved in this matter the consideration of what constitutes a reasonable use of one's property. At common law this is strictly a judicial question of fact, the answer to which varies according to the circumstances of each case. One is expected to endure a reasonable amount of discomfort and annoyance for the public good, which is furthered by the permission of trades and manufactures, the prosecution of which necessarily involves a certain amount of annoyance or injury to the inhabitants of the neighborhood. In all such cases, it is a question of equity, on whom is it reasonable to impose the burden of the inevitable loss, resulting from this clashing

[1] § 18.

of interests; and independently of statute it is strictly a judicial question, and all the circumstances of the case must be taken into consideration.[1]

But the legislature frequently interferes to modify the common law of nuisances; sometimes legalizing what were nuisances before the enactment, and sometimes prohibiting, as being nuisances, what were not considered to be such at common law. No legislative act can justify a nuisance, which is wilfully committed and which serves no useful purpose. But when the objectionable act serves a useful purpose, and supplies a public want, the private right of personal security against nuisances must yield to the public necessity, whenever a legislative act calls for the sacrifice. It is a constitutional exercise of police power to legalize a nuisance, if the public exigencies should require it. It is of course a matter of legislative discretion, whether the legalization of the nuisance is required by the public necessities. Thus it has been held to be lawful for the legislature to authorize the ringing of bells and the blowing of whistles by the locomotives of railroads at the times when, and in the places where, it would otherwise be a nuisance. The public safety required the imposition of this burden upon the comfort and quiet of those who may thereby be disturbed.[2] In the same manner the legislature may authorize the prosecution of certain trades and occupations in localities, which would, under like circumstances, be considered a nuisance at common law. But in all these cases of legalization of nuisances, the legislative interference must promote some public good. If the benefit, derived from the authorization of the nuisance, is altogether of a private character; if it can in no legitimate sense be considered as a public benefit, the legislative interference is unwarranted, and it is the

[1] See *ante*, § 24.

[2] Sawyer *v.* Davis, 136 Mass. 239 (49 Am. Rep. 27); Pittsburg, Cin. & St. L. R. R. Co. *v.* Crown, 57 Ind. 45 (33 Am. Rep. 73).

duty of the courts to declare the statute to be unconstitutional. It is a question for the legislature whether the public needs require the legalization of the nuisance; but it is a judicial question whether such a legislative act serves a public want.

On the other hand, through the interference of the legislature, the doing of acts may be prohibited on the ground of being nuisances, which otherwise have been held to be permissible, because of the public benefit resulting from these acts. The courts may determine, independently of statute, that the public benefit from a certain unwholesome or annoying trade far outweighs the personal discomfort or injury to health, which attends the prosecution of the trade, and for that reason may refuse to prohibit; but the legislature is not precluded from reaching a different conclusion. Granting that the act or trade produces discomfort or injury to health, it is ultimately a legislative question whether the public welfare requires the imposition of this burden. No one has a natural right to do that which injures another. If the law permits him to do this it is a privilege, which may be revoked at any time by the proper authority. The police power of the government is reposed in the legislature. It is quite a common experience for the legislature, either to prohibit altogether, or to regulate the doing of that which works an annoyance or injury to others.[1]

Two illustrations may be given to indicate how changing civic conditions will justify the permission of an evil or nuisance at one time, and call for its suppression at a later day.

[1] Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of gunpowder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of the dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." 2 Kent Com. 340.

In small towns and villages, in which no general sewage system has been provided, the construction and use of privy vaults is a necessity to the people, which under the circumstances far outweighs the injury to the public health, which their existence threatens. But as the community increases in population and becomes more thickly settled, the government may justly regulate the location of these vaults, in order to reduce the danger to the public health to a minimum, until, when the town grows to the dignity of ownership of a sewage system, the vaults may be prohibited altogether. There can be no serious contest over the constitutionality of such regulations. They have, however, been questioned and their enforcement resisted in two cases; but in both cases they have been sustained as a reasonable exercise of the police power.[1]

The same experience is met with in the keeping of cows, pigs, and other animals in small towns, on the premises of one's dwelling. This may be permitted in a town which is sparsely settled, and large yards surround each dwelling, without endangering the public health to any very serious degree. But when the town becomes more thickly settled, and the large grounds are fast being divided up into twenty foot lots, the keeping of such animals on the premises becomes a serious nuisance, which may be restricted or prohibited altogether, according to the demands of public opinion. Recently, a town ordinance in Maryland, regulative of the keeping of cows within the limits of the town, imposed restrictions upon the keeping of cows as a business, which were not imposed upon those, who kept cows for their own personal convenience. The discrimination in favor of the latter was held not to invalidate the ordinance, inasmuch as the keeping of a number of cows, in the dairy business, is a very different nuisance, both in kind and

[1] Sprigg *v.* Garrett Park (Md. '99), 43 Atl. Rep. 813; Cartwright *v.* Board of Health, 56 N. Y. S. 731; 39 App. Div. 69.

degree, from that which is occasioned by the keeping of one or two cows, to supply one's own family with the milk they require.[1]

§ 146. **What is a nuisance, a judicial question.** — It is clearly within the legislative discretion to determine whether the private interest or the public good shall yield in a case where the two are antagonistic, and to prohibit or permit the doing of what promotes the public welfare and at the same time causes personal discomfort or injury ; and its judgment cannot be subjected to a review by the courts. The courts cannot reverse the legislative decree in such a case; it is not in any sense a judicial question. But the police power of the legislature, in reference to the prohibition of nuisances, is limited to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others. The legislature cannot prohibit a use of lands, which works no hurt or annoyance to the neighbors or to adjoining property. The injurious effect of the use of the land furnishes the justification for the interference of the legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, when it is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance, because the legislature has declared it to be so. The legislature can determine whether it will permit or prohibit the doing of a thing which is harmful to others, in the proper consideration of the public welfare ; but it cannot prohibit as a nuisance an act which inflicts no injury upon the health or property of others. If the harmful or innocent character of the prohibited use of lands furnishes the test for determining the constitutionality of the legislative prohibition, it is clearly a judicial question, and is certainly not within

[1] State *v.* Broadbelt (Md. '99), 43 Atl. Rep. 771

the legislative discretion, whether the prohibited act or acts work an injury to others. If they do not cause injury or annoyance to others, the attempted legislative interference is unwarranted by the constitution, and it is the duty of the courts to declare it to be unconstitutional.

In the case of Lawton *v.* Steele,[1] the court say: "The statute defines and declares a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise.[2]

The following language from an opinion of the Supreme Court of New Jersey will serve to fortify the position here taken on the limitation of the legislative power to declare what is a nuisance: "Assuming the power in this board [of health] derived from the legislature, to adjudge the fact of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised, and upon notice to the parties interested, still, I think, it is obvious that, in a case such as that before this court, the finding of the sanitary board cannot ope-

[1] 119 N. Y. 233.

[2] Citing In re Jacobs, 98 N. Y. 98; Mugler *v.* Kansas, 123 U. S. 661.

rate, in any respect, as a judgment at law would, upon the rights involved. It will require but little reflection to satisfy any mind, accustomed to judge by legal standards, of the truth of this remark. To fully estimate the character and extent of the power claimed, will conduct us to its instant rejection. The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him *pro tanto*, of the enjoyment of such property. To find conclusively against him, that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property, is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself, in any other respects, is, and the one interest can no more than the other be taken out of the hands of the ordinary tribunals. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of eminent domain upon compensation made, neither can he, in any other mode, be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hands of the individual, is a common-law right, and is derived in every instance of its exercise, from the same source — that of necessity. It is akin to the right of destroying property for the public safety in case of the prevalence of a devastating fire or other controlling

exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind." [1] To

[1] Hutton *v.* City of Camden, 39 N. J. 122 (23 Am. Rep. 209). See Manhattan Fertilizing Co. *v.* Van Keuren, 8 C. E. Green, 251; Weil *v.* Ricord, 9 C. E. Green, 169. "The common council, in the exercise of the power to declare nuisances, may not declare anything such which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience, and even then not when the thing complained of is expressly authorized by the supreme legislative power in the State. Its legislation must be subordinate to that of the State, the power to which it owes its existence. When its acts of legislation are brought before this court, whose high duty it is to see that inferior tribunals, vested with a limited jurisdiction, whether legislative or judicial, do not exceed their power, we must determine whether these are valid or not. I cannot think an ordinance declaring the running of any locomotive or train of cars upon any track in this city, at a greater rate than one mile in six minutes a removable nuisance or declaring the stopping of a train of cars for one moment upon the track of a railroad authorized by law, where the track does not cross a street or a public square, a removable nuisance, is a fair or legal exercise of the power to declare nuisances and provide for their removal. * * * The doing of such acts cannot interfere with the public health or expose the inhabitants of the city to danger or inconvenience. I do not see why any railroad depot, or track, or freight house, any train of cars in motion or stationary at any point in the city, cannot under the same power, with equal propriety, be declared nuisances, if the common council should so determine." State *v.* New Jersey, etc., R. R., 29 N. J. L. 170. "There is a difference between abating a nuisance and declaring what shall be a nuisance. For the definition of a nuisance, and consequent ascertainment of the subjects to which their power of abating or removing may be extended, the council must refer to the general law, just as they must, in requiring the performance of patrol duty, learn what that duty is. In derogation of the ordinary rights of property, they may abate or remove anything which by law is a nuisance, and in an action against them proof, that a thing was a nuisance, and was therefore removed or destroyed, would constitute their justification. But they have no power to declare that to be a nuisance which is not, or to dispense with other proof of the noxious character of a thing, by showing that by an ordinance they had declared

the same effect is the following quotation from the opinion of the Supreme Court of the United States in a case in which the constitutionality of a city ordinance was questioned, which declared certain wharf structures to be nuisances and provided for their removal: "The mere declaration by the City Council of Milwaukee that a certain structure was an encroachment or an obstruction did not make it so, nor could such a declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by a mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." [1]

§ 147. **The regulation of unwholesome and objectionable trades.** — Perhaps the judicial character of the power to determine what is a nuisance, is best displayed in the consideration of a late case from the New York Court of Appeals,[2] in which an act of the legislature was declared to be unconstitutional, which made it a misdemeanor to manufacture cigars, in cities of more than five hundred thousand inhabitants, in any tenement house occupied by more than three families, except on the first floor of the house, on which there may be a store for the sale of cigars and tobacco. In delivering the opinion of the court, Judge Earle said: "It is plain that this law interferes with the profitable and free use of his property by the owner or

that all such things should be nuisances." Dissenting opinion of Wardlaw, J., in Crossby *v.* Warren, 1 Rich. L. 388; Lakeview *v.* Setz, 44 Ill. 81. See Baldwin *v.* Smith, 82 Ill. 163.

[1] Yates *v.* Milwaukee, 10 Wall. 505.

[2] In the matter of Jacobs, 98 N. Y. 98 (50 Am. Rep. 636).

lessee of a tenement house who is a cigar maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property and of some portion of his personal liberty. The constitutional guaranty that no person shall be deprived of his property without due process of law may be thus violated without the physical taking of property for public or private use. This guarantee would be of little worth if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house or to work at any lawful trade therein. If the legislature has the power under the constitution to prohibit the prosecution of one lawful trade in a tenement house, then it may prevent the prosecution of all trades therein." * * * "All laws which impair or trammel these rights, which limit one in his choice of a trade or a profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except in police regulations) are infringements upon his fundamental rights of liberty, which are under constitutional protection." * * * In speaking of the limitations upon the police power of the government, he continues: "Under it the conduct of an individual, and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other, and in cases of great emergency, engendering overruling necessity, property may be taken and destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. It furnishes the supreme law, and so far as it imposes restraints the police power must be exercised in subordination thereto." * * *

"Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is subject to the review of the courts. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health."

Whether the court was correct in holding this statute to be unconstitutional, because the regulation did not tend to promote the public health, need not be discussed here. The principle is clearly settled, that the court did not exceed its power, in pronouncing the law to be unconstitutional on that ground. But the court would have trespassed upon the powers of the legislature, if it had undertaken to pass upon the necessity of the regulation. It falls within the legislative discretion in every case to decide upon the necessity for the exercise of its police power.

It can not be questioned that the State has the power to prohibit the prosecution of all unwholesome or injurious trades and employments in these large tenement houses in our metropolitan cities, in which the people are often huddled together like cattle. The manufacture of cigars is considered by some to so taint the atmosphere as to endanger the health of the occupants of the house. If this be true, then the legislature has undoubtedly the power to prohibit the prosecution of this trade in a tenement house occupied by three or more families. The injurious effect upon the health of the cigarmaker's family may not furnish the proper justification for legislative interference, except in behalf of minor children. For since the wife and grown children, in the theory of law, if not in fact, voluntarily subject them-

selves to the unwholesome odors of the tobacco, they do not need and cannot demand the protection of the law. But where a house is occupied by more than one family, the other families have a right to enjoy the possession of their parts of the house, free from the unwholesome or disagreeable odors of a trade that is being plied by another in the same house.

A very common evil is the washing of soiled clothes in tenement houses. There can be very little doubt that infectious and contagious diseases may be communicated and spread over a large area through the medium of soiled clothes; and if the legislature were to see fit to prohibit washerwomen from plying their trade in tenement houses, I cannot see what constitutional objection could be raised to such and similar regulations, even though their enforcement may impose very great hardships upon those who can least bear them. Granting that the prohibited trade is unwholesome to the occupants of the house, the advisability of the prohibition must be referred to the legislative discretion.

As long as a trade does not injure the public health, and is the source of no annoyance whatever to the inhabitants of the locality in which it is conducted, it cannot lawfully be prohibited.[1] Every man has a constitutional right to follow on his premises any calling, provided it does not in any way interfere with another's reasonable enjoyment of his premises. But if the prosecution of a certain trade affects another injuriously, the State may so regulate the trade that the injury may be avoided or reduced to a minimum. The exclusion of any lawful business from a particular locality can only be justified upon the ground that the health, safety or comfort of the surrounding community requires such exclusion. If the trade is in itself, and necessarily, harmful to one's neighbors, or to the public

[1] See *ante*, § 126, on the police control of employments in respect to locality.

health, it may be prohibited altogether. But if it can be prosecuted under certain limitations, so as to avoid injury to others, the police regulation must be confined to the imposition of these needed restrictions, and the trade cannot be absolutely prohibited.[1]

The police regulation cannot extend beyond the evil to be remedied. Where, therefore, certain trades and employments, which serve some useful purpose and add something to the world's wealth, are harmful to the inhabitants of the locality, in which they may be conducted; and the harm may be avoided altogether, or considerably reduced, by confining them to localities, in which the population is sparse and the residences are few; it is altogether permissible to prohibit the prosecution of these trades in other localities. The instances of this kind of regulation are very numerous. Slaughter-houses have been confined to certain localities,[2] the sale of fresh meat and vegetables has been prohibited except in the public markets, where the articles exposed for sale may be conveniently inspected.[3] In the same way may the manufacture of pressed hay,[4] the

[1] "Conceding that the power 'to abate and remove' should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things that are nuisances in themselves and necessarily so. There are some things which in their nature are nuisances, and which the law recognizes as such; there are others which may or may not be so, their character in this respect depending on circumstances." Lake View *v.* Setz, 44 Ill. 81.

[2] Cronin *v.* People, 82 N. Y. 318; Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; Slaughter-house Cases, 16 Wall. 36; Milwaukee *v.* Gross, 21 Wis. 241; Villavaso *v.* Barthet, 39 La. Ann. 247; Beiling *v.* City of Louisville, 144 Ind. 644.

[3] Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 418; Winnsboro *v.* Smart, 11 Rich. L. 551; Bowling Green *v.* Carson, 10 Bush, 64; New Orleans *v.* Stafford, 27 La. Ann. 417 (21 Am. Rep. 563); Wartman *v.* Philadelphia, 33 Pa. St. 202; St. Louis *v.* Weber, 44 Mo. 547; Ash *v.* People, 11 Mich. 347; Leclaire *v.* Davenport, 13 Iowa, 210. *Contra*, Bethune *v.* Hayes, 28 Ga. 560; Caldwell *v.* Alton, 33 Ill. 416; Bloomington *v.* Wahl, 46 Ill. 489.

[4] Mayor City of Hudson *v.* Thorn, 7 Paige, 261.

maintenance of dairies,[1] the cultivation of land within the limits of a town,[2] and the storage of cotton and other combustible material, such as oil and gunpowder, be prohibited in the densely settled parts of the city, and the prosecution of such trades be confined to certain less dangerous localities. In the same way may the sale of intoxicating liquors be prohibited in certain localities, for example, within a certain distance of the State insane asylum, university or State capitol,[3] provided it be conceded that the sale of intoxicating liquors in those localities, in a legal sense, threatens an injury to the public.[4] It has also been held to be permissible to prohibit the sale of intoxicating liquors in the residential portions of a town or city; while the business is permitted to be carried on elsewhere.[5] The prohibition of the business of fat-rendering and bone-boiling within the limits of a city has likewise been sustained.[6]

But in all these cases the prohibition must be confined to the removal of the evil to be guarded against. There cannot be an absolute prohibition of a trade in a locality, in which it may be prosecuted without annoyance or inconvenience to the neighboring residents. Thus it has been held to be unreasonable to prohibit the establishment of a steam engine within the limits of the city.[7] So, also, has it been held to be unconstitutional to prohibit indiscriminately the prosecution of all kinds of busi-

[1] In re Linehan, 72 Cal. 114; State *v.* Broadbelt (Md. '99), 43 Atl. Rep. 771.

[2] Town of Summerville *v.* Pressley, 33 S. C. 56.

[3] State *v.* Joyner, 81 N. C. 534; Ex parte McClain, 61 Cal. 436 (44 Am. Rep. 554); Dorman *v.* State, 34 Ala. 216; Boyd *v.* Bryant, 35 Ark. 69 (37 Am. Rep. 6); Trammell *v.* Bradley, 37 Ark. 356; Bronsin *v* Oberlin, 41 Ohio St. 476 (52 Am. Rep. 90).

[4] See *ante*, § 125.

[5] Shea *v.* City of Muncie, 148 Ind. 14.

[6] People *v.* Rosenberg, 67 Hun, 52; Fertilizing Co. *v.* Hyde Park, 97 U. S. 759.

[7] Baltimore *v.* Redecke, 49 Md. 217 (33 Am. Rep. 239.)

ness on a certain boulevard or street.[1] And in California, where antipathy to the Chinese has occasioned numerous hostile acts of legislation, it was held to be unconstitutional to prohibit the prosecution of the laundry business in certain localities (in that case the Chinese quarters of San Francisco), unless it can be shown that the health, comfort or safety of the community was thereby endangered.[2]

It has been well-established that the length of time, during which a business has been conducted in a certain locality, does not make its prohibition for the future unconstitutional. Granted the fact, that by the growth of a city, the locality has been converted into a thickly populated district, and that in consequence of such municipal growth, the health, comfort or safety of the people would be endangered by the continuance of the business in that locality, the power of the government, to prohibit the further prosecution of the objectionable business in that locality, is not at all limited or restricted by the fact that the enforced removal to another locality would entail heavy or irreparable loss upon proprietors.[3]

An extremely interesting and important case has recently arisen in the courts of Louisiana, which involves the exercise of the police power for the confinement of objectionable trades within a prescribed locality, and the prohibition of it elsewhere; while it at the same time raises the question of the power of the government over vice and vicious practices.

The city of New Orleans enacted an ordinance which set apart certain sections of the city within which prostitutes

[1] City of St. Louis *v.* Dorr, 145 Mo. 465.

[2] In re Hong Wah, 82 Fed. 623; Ex parte Sing Lee, 96 Cal. 354. In the latter case, it was held that the regulation was nevertheless invalid, although it provided that the business could be carried on elsewhere, with the written consent of a majority of the real property owners of the block.

[3] Fertilizer Company *v.* Hyde Park, 97 U. S. 759; Fertilizer Company *v.* Malone, 73 Md. 268; Villavaso *v.* Barthet, 39 La. Ann. 247.

were required to live. The ordinance has been in force for some time, and recently the area of permitted habitation of that class of the population has been enlarged. The constitutionality of the ordinance was attacked principally upon two grounds: *first*, that the ordinance necessarily involves the licensing of trade in vice, which is not allowable; and, *secondly*, that the values of real estate are depreciated by the ordinance. The court denied the soundness of both arguments, and sustained the ordinance as a constitutional exercise of the police power. In rendering this judgment, the court said in part:[1]—

"The regulation of houses of prostitution would seem to be so closely connected with public order and decency, the policy announced by the ordinance has been so long exerted in all large cities of our country, and the power has had such frequent recognition in the charters of this city, that it would seem the power itself cannot be successfully controverted.[2] We have, however, given careful attention to the argument that urges objection to all such legislation, and which directs attention to the grounds of opposition deemed specially applicable to the ordinance, the execution of which is sought to be arrested. That there are limitations to the power asserted by this ordinance, may be conceded. It does not, however, readily occur to the mind that confining houses of this character within certain limits by the appropriate ordinance, is violative of any of the constitutional guaranties invoked in this discussion before us. The ordinance neither sanctions nor undertakes to punish vice. The power to punish vice, not in the form of an offense, denied by the argument and enforced by the authorities we find in the briefs, is, in our view, entirely distinct from the function the ordinance asserts as belonging to municipal government, by the express terms of the city charter. It is urged, too, the

[1] L' Hote *v.* City of New Orleans, 51 La. Ann. 93.

[2] City Charter 1870, § 12; *Id.* 1882, § 8; *Id.* 1896, § 15.

ordinance is a license for vice, and hence illegal.[1] Undoubtedly, the court should refuse its aid to any ordinance if of the character asserted by the argument. The vice, the subject of this ordinance, beyond the reach of penal statutes, is simply subjected by this ordinance to that restraint demanded by the public interest. The unfortunate class dealt with by the ordinance must live. They are not denied shelter, but assigned that portion of the city beyond which they are not permitted to establish their houses. Thus viewed, the ordinance cannot be deemed open to the objections that it either punishes or grants a license to vice beyond the competency of the council." * * * "There remains the argument addressed to us, varied in form, but maintaining the general proposition that the ordinance operates to deprive the citizen of his property, that is, to depreciate its value — the same as deprivation in legal effect. We can readily appreciate there might be an arbitrary exercise of this power that would warrant an appeal to the courts. Thus, to extend these limits so as to embrace, without any apparent reason, if reason could exist, portions of the city always devoted to private residences, schools, churches and other lawful uses, might well be deemed oppressive and an abuse of the power of municipal government; but as we understand this ordinance in its main features, it is restrictive — that is, it confines these houses within narrower bounds. * * * To whatever extent, however, the right of private property may be deemed affected by this last ordinance, it must be borne in mind that it is the great power of government given to preserve the morals, health, and lives of the community that requires the surrender of right by the citizens supposed to be exacted by this ordinance. To that police power all must yield obedience. As put in the text-books and enforced by all decisions:

[1] Tiedeman Pol. Power, p. 291.

Every citizen holds his property subject to the proper exercise of the police power exerted either by the Legislature or by the subordinate political corporations. It is settled that police laws and regulations, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not expropriate property for public use. If the individual sustains injury it is deemed *damnum absque injuria;* or in the theory of the law, the injury to the owner is deemed compensated by the public benefit the regulation is designed to subserve."

The reference of the court to a preceding text of this book[1] as well as the present case, should be read in connection with what is stated in the section,[2] in which the distinction is made between vice and crime as subjects for police regulation, and the police jurisdiction over the former denied.

In Kentucky, a statute was enacted, forbidding any person from carrying on the stabling business within a specified distance of the grounds of a named agricultural society during the maintenance of its fairs, and imposing a penalty for the breach of the law. In a suit, brought under the statute, it could not be established that the prosecution of the business of stabling in that locality was likely to produce any public harm, and the court therefore declared the regulation to be an unconstitutional interference with the right of enjoyment of private property.[3] But the location of stables within a city may and is often regulated in the interest of the public health.[4]

Another curious and questionable exercise of police power, in prohibiting objectionable trades in certain localities, is to

[1] In the present edition, § 121.

[2] Present edition, § 60.

[3] Commonwealth *v.* Bacon, 13 Bush, 210 (26 Am. Rep. 189); see to the same effect, Meyers *v.* Baker, 120 Ill. 567.

[4] City of Newton *v.* Joyce, 166 Mass. 83.

be found reported in the case of Commonwealth *v.* Bearse.[1] A statute was passed, prohibiting the establishment of any store, tent, or booth, for the purpose of vending provisions and refreshments, or for the exhibition of any kind of show or play, within one mile of the camp-meeting grounds during the time of holding any camp or field meeting for religious purposes, except with the consent of those having the camp-meeting in charge, provided that no one will be required to suspend any regular, usual, and established business, which is being conducted within such limits.[2] The object of the statute was to prevent the disturbance of the religious meeting by the presence of hucksters and peddlers, who are drawn thither purely by the desire to barter with those who are in attendance upon the meeting. Inasmuch as no one's regular business is interfered with, the owner of contiguous land is only prohibited from so using his land as to make a profit out of the camp-meeting, to the annoyance of those who have assembled there for worship. This limitation upon the right of enjoyment of one's lands was declared to be a constitutional exercise of police power. The court say: "It is contended that the defendant's use of his own land is subjected to the will of another; that he cannot under this law use it for an otherwise lawful purpose, except with the consent of another. But no general control has been assumed over his land; no lawful and established business that he has is interfered with. If it be that of selling provisions and refreshments he may continue it, although the camp-meeting has assembled. If he purposes to make a use of his land that he would not have made but for the assembling of the camp-meeting, that is not an improper police regulation which requires him to obtain the consent of its authorities. * * * If a business were in its character such as was, or was liable to become, a nui-

[1] 132 Mass. 542 (42 Am. Rep. 450).

[2] Mass. Statute of 1867, ch. 59.

sance, the legislature might entirely forbid it. It would equally provide that it should not be maintained except with the consent of those in whose vicinity it was to be carried on, on account of the inconveniences attending it. This does not compel one to submit to others the inquiry whether he shall use his own land in a lawful way, but it is a legislative decision that such use is not lawful or permissible, unless consent is obtained from those who are already using their property in such a way that they may be annoyed."

Confined within these narrow limits, it is probable that the constitutionality of the regulation may be sustained, on the ground that the business of catering to the wants of those in attendance on the camp-meeting may become a nuisance, unless it is regulated in this manner. But a law could not be sustained, which compelled a man to suspend his regularly established business during the time of holding the meeting, because in the regular prosecution of his business he might supply the wants of the camp-meeting company. Such a law would be an unconstitutional interference with the natural right of enjoyment of one's property.

Somewhat in the line of the subject of the present section, is the attempt by legislation to suppress the smoke nuisance; particularly, in the places where bituminous coal is used. There can be no question that the State has the power to compel those who use the coal in populated districts to employ every known means of a reasonable character to consume the smoke. But, in the enforcement of such a regulation, it must apply equally and impartially to all. For the reason, that certain factories were excepted from the enforcement of such a regulation, the act, prohibiting the emission of dense smoke within a city was declared to be unconstitutional.[1]

[1] State *v.* Sheriff of Ramsey County, 48 Minn. 236.

§ 148. **Regulation of mines and mineral products.** — In the mining States, there are numerous regulations which are designed to secure the safety and health of the miners and the protection of the adjoining property. So far as I know, the reasonableness and necessity of these regulations have been so apparent that their constitutionality has not been attacked, except in the case of the regulations which limit the hours of work of the miners, as has been already explained in a preceding section;[1] and in the following case from Missouri. A law was passed in that State, requiring in all dry and dusty coal mines, in which light carbonated hydrogen gas is discharged, or in which the coal is blasted off the solid, that shot-firers must be employed to fire the shots, after the employees have left the mines, and prohibiting any firing while the miners are still at work or in the mines, upon pain of fine and imprisonment, for any violation of the statute. The Supreme Court of Missouri held this to be only a reasonable exercise of the police power for the protection of the health and life of the miners, and that it did not constitute a taking of the property of the mine-owner without due process of law.[2]

A curious regulation, somewhat akin to the regulation of the right to hunt game and to catch fish, has been adopted in Indiana, for the purpose of preventing the waste of the natural gas, which is found in the coal mines of that and neighboring States. Inasmuch as the natural gas deposits are the common property of all the landowners, a wasteful use of the gas by one of them, works necessarily an injury to all, which is certainly unjustifiable in morals, and which is now made illegal and punishable by statute. The Supreme Court of Indiana has sustained the constitutionality of the law, as a reasonable exercise of police power.[3]

[1] § 102.

[2] State *v.* Murlin, 137 Mo. 297; 38 S. W. 923.

[3] Townsend *v.* State, 147 Ind. 624.

This natural gas is now transported for consumption from place to place, and from State to State, in pipes, in the same manner that manufactured gas is distributed. The legislature of the States, in which the natural gas is so transported, have adopted regulations, to insure against waste and explosions, which require the pipes to have a prescribed strength of pressure. This regulation has been resisted by the transportation companies, on two grounds: first that the prescribed limitation of the pressure was unreasonable, and hence was a taking of property without due process of law, and *secondly*, that it was an interference with interstate commerce. On both propositions the courts have sustained the regulation.[1]

§ 149. **Regulation of burial-grounds.** — The burial of the dead within the limits of towns and cities has always been and still is, a common evil. In the past, little attention was paid to sanitary regulations of any kind, and the injurious effect of the burial of the dead in thickly settled communities was seldom considered. But in some communities public opinion has been aroused on the subject, and laws have been passed which prohibit interments within certain limits. In all the cases in which the constitutionality of this law was brought into question, it has been conceded that the legislature may regulate the burial of the dead, and prohibit it in those localities in which it will prove injurious to the public health; [2] but it is doubt-

[1] That it was a reasonable exercise of police power, Jamieson *v.* Indiana Natural Gas & Oil Co., 128 Ind. 555. That it was not a regulation of interstate commerce, Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446; Benedict *v.* Columbus Construction Co., 49 N. J. Eq. 23.

[2] Brick Presb. Church *v.* Mayor, etc., 5 Cow. 538; Coates *v.* Mayor, etc., 7 Cow. 585; Kincaid's Appeal, 66 Pa. St. 423 (5 Am. Rep. 377); City Council *v.* Wentworth St. Baptist Church, 4 Strobh. 310; Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 192; Pfleger *v.* Groth (Wis. '99), 79 N. W. 19; People ex rel. Oak Hill Cemetery *v.* Pratt, 60 Hun, 582; 14 N. Y. S. 551; City of Austin *v.* Austin City Cemetery, 87 Tex. 330; Humphrey *v.* Board of Trustees of M. E. Church, 109 N. C. 132; City

ful how far such a police regulation may be prevented directly or indirectly, by agreements, that a cemetery shall be established in a given locality. In New York, it was held that a grant of land by the municipal corporation, for the purpose of a cemetery, with covenants of quiet enjoyment, did not prevent the passage of an ordinance prohibiting interments in that part of the city. It was no impairment of a contract, as municipal corporations have no power to make a contract, controlling or taking away their police power.[1] The fact, that the cemetery is the property of a municipal corporation, does not affect the power of the legislature to prohibit further interments therein, if such future use of the cemetery threatens the public health.[2]

But it has been held in Illinois that the legislature has no right to prohibit the burial of the dead in the grounds of a cemetery company, which it has been authorized to lay out for that purpose. The court say: "A cemetery is not a nuisance *per se* and the subject of legislative prohibition. The legislature has the constitutional right to pass laws regulating the interment of the dead, so as to prevent injury to the health of the community, and this in respect to a private corporation acting under its charter, as well as with individuals. But the legislature cannot prohibit the burial of the dead in lands purchased and laid out at great expense by a corporation chartered for the purpose. Such a statute is unconstitutional, as impairing the obligation of the contract contained in the charter." [3]

of Newark *v.* Watson, 56 N. J. L. 667. But it has been held that a city, county or town cannot prohibit or suppress cemeteries, under a charter power to institute police regulations. Los Angeles County *v.* Hollywood Cemetery Ass'n, 124 Cal. 344.

[1] Brick Presbyterian Church *v.* Mayor, etc., 5 Cow. 538; Coates *v.* Mayor, etc., 7 Cow. 585.

[2] City of Newark *v.* Watson, 56 N. J. L. 667.

[3] Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 192 (22 Am. Rep. 71). See *post* for the general discussion of the restriction upon the exercise of police power contained in the charters of private corporations.

The prohibition of future burials of bodies in a cemetery is a very different regulation from one, which requires the removal of the bodies which have been buried there prior to the enactment of the prohibitory statute, the removal of monuments and vaults, and the conversion of the cemetery into a public park or its devotion to some other public use. While it may be true that the presence of the bodies, which have been already interred, may be just as prejudicial to the health of the community, as any future interment would be; in the former case, there is something more than the mere question of property right. In the estimation of most people, the ground, in which their loved ones have been buried, becomes hallowed; and they consider it a sacrilege to devote such land to any other purpose. If, in any case, the presence of the bodies already buried were to be considered so injurious to the public health, as that the removal of this cause of danger to health is imperatively demanded, the same end can be attained by compelling the exhumation and cremation of the bodies, and the reburial of the ashes, without offending the almost universal sentiment, that a cemetery is hallowed ground, by converting it into a public park, or devoting it to some other unhallowed use. But the authorities do not generally take this view of the matter. While the New Jersey Supreme Court has held that a law was unconstitutional, which provided for such a conversion of a cemetery;[1] the authorities, generally, seem to justify such an exercise of the police power. But, in order that the cemetery may be so taken, the land must be purchased by the city, in the exercise of the right of eminent domain.[2]

The regulations of the burial of the dead have so far

[1] Stockton *v.* City of Newark, 42 N. J. Eq. 531.

[2] Scovill *v.* McMahon, 62 Conn. 378; Brooks *v.* Taynton, 40 N. Y. S. 445; Woodmen Cemetery *v.* Roulo, 104 Mich. 595; City of Columbus *v.* Town of Columbus, 82 Wis. 374; Humphrey *v.* Board of Trustees M. E. Church, 109 N. C. 132.

been confined to the prohibition of burial in the compact parts of a city, or within the city boundary. It is also held by some[1] that a cemetery is not a nuisance *per se*, and consequently the interment of the dead cannot be prohibited altogether. Of late, the advocates of cremation of dead bodies have been urging the unwholesomeness of burial as a reason why cremation should be adopted in its stead, as a means of disposing of corpses. If the burial of the dead does not cause or threaten injury to the public health, burial could not lawfully be prohibited; but if it is proven to be a fact that the interment of dead bodies does injure the public health, and is a fruitful source of the transmission of disease, as it is claimed to be by many scientists, it cannot be doubted that the State may prohibit burial and compel the remains of the dead to be cremated, or disposed of in some other harmless way.

In addition to the regulation of the locality in which burial is permitted, there are usually some regulations concerning the manner of interment, the object of which is to prevent any deterioration of the public health, as, for example, that the grave must be of a certain depth, and that the interment shall not be made without special license from the health officer.

§ 150. **Laws regulating the construction of buildings in cities.** — In years gone by a man was at liberty to build his house or other building as he pleased, and of what he pleased. He could imitate the example of the Biblical wise man, and build it upon a rock; or, foolishly following the precedent of the foolish man, he could build it upon the sand; and no government official could interpose an objection. But this individualistic license no longer is permitted. Public opinion recognizes the indubitable fact that the builder of the house or other structure is not the

[1] See Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 192 (22 Am. Rep. 71).

only one who is interested in the character and method of its construction. Public opinion requires that the government should exercise its powers of supervision over the construction of every building, in order to guard not only the owner, but the possible tenants and occupants, as well as the public in general, against unsound and insecure construction, and unsanitary conditions. Building laws are now enacted and enforced in all of the larger cities. The foundations must be of the required depth and strength; the walls must be of the required thickness, and made of the approved materials; the plumbing must be constructed according to the approved plans; and, in certain kinds of buildings, all the known and reasonable means for making the structure so-called fire-proof must be employed. These regulations have frequently been contested; but the principle, that it is within the police power to regulate the construction of buildings, for the promotion of the health, comfort and safety of the people, has never been questioned or doubted by any court. In the few cases, in which a building regulation has been declared void, it has been so held, because under the circumstances of the particular case the regulation was deemed to be unreasonable or unnecessary.

A most vigorous opposition was made in recent years to a law of the city of New York, which required the owners of tenement houses to furnish a supply of water on every floor. The Court of Appeals, however, reversing the judgment of the lower court, held it to be only a reasonable regulation, in the promotion of the health of the occupants of the tenements, which was not made unreasonable by the fact that the expense of the improvement was not warranted by the low rental, which the occupants were able to pay.[1] Tenement houses are held to fall peculiarly within the

[1] Health Department of City of New York *v.* Rector, etc., of Trinity Church, 145 N. Y. 32.

sphere of police regulations, which are designed to promote the health and safety of the tenants, as well as of the public. Indeed, it has been held that a tenement is devoted to a quasi-public use which, under the principle of the case of Munn *v.* Illinois, enlarges the regulative powers of the government.[1]

Along the same line was a decision of the Supreme Court of Massachusetts, which held a regulation to be valid which required all water-closets to be connected with the public sewer, and provided that all buildings, in which people live or are employed, should have water-closets, constructed in accordance with the statutory requirements.[2]

It is now a very common requirement of tall buildings, that fire-escapes should be provided, other than the ordinary stairways. The regulation has been ordinarily acquiesced in, if not generally complied with. In one case, in which the validity of the regulation was contested, it was sustained as a reasonable exercise of police power.[3]

The disposition to construct inordinately tall buildings seems to be growing; every new building of the kind, known as skyscrapers, seeming to reach a higher altitude than the preceding ones. Streets, of a width, sufficient for the construction of three and four story buildings, become narrow and poorly ventilated alleys, when rows of buildings line them with their eighteen to twenty-three stories. Unless the height of such buildings is limited by law, there will be no other limit to the height of future structures; and both the health and safety of the population will be endangered. There can be no doubt of the constitutionality of a law which limits the height of buildings; and so has the New York Court of Appeals decided.[4]

[1] See Matter of Paul, 94 N. Y. 497; People *v.* King, 110 N. Y. 418; People *v.* Budd, 117 N. Y. 1; *s. c.* 143 U. S. 517.

[2] Commonwealth *v.* Roberts, 155 Mass. 281.

[3] City of Cincinnati *v.* Steinkamp, 54 Ohio St. 284.

[4] People *v.* D'Oench, 111 N. Y. 359.

But the public health or safety must be endangered, in order to justify legislative restriction upon the character of buildings. Regulations, which are designed only to enforce upon the people the legislative conceptions of artistic beauty and symmetry, will not be sustained, however much such regulations may be needed for the artistic education of the people. Thus, for example, a State law, which required all buildings to conform to a prescribed building line, was held to be unconstitutional.[1]

For obvious reasons, it is a constitutional exercise of the police power to prohibit the removal of buildings upon or across any street or highway, without a prior permit of a city or town government.[2]

Another great danger, which threatens all thickly settled communities, is that of more or less extensive conflagrations, resulting from accidental fires. Every house, everywhere, is subject in a greater or less degree to the danger of destruction by fire; but it is only when the buildings are closely built, that the danger of fire being communicated from an adjoining building becomes great enough to call for special regulations for preventing the spread of such accidental fires. The danger of destruction by fire is least when the buildings are constructed of more or less non-combustible material. It would probably be considered unreasonable to require all buildings to be absolutely fire-proof,[3] but it is a common regulation in the large cities to prohibit the erection of wooden buildings, or of buildings with wooden, or shingle roofs. This regulation has often been subjected to judicial criticism, but the constitutionality of it has invariably been sustained.[4] The in-

[1] City of St. Louis *v.* Hill, 116 Mo. 527.

[2] Wilson *v.* Eureka City, 173 U. S. 32.

[3] See Ex parte Whitwell, 98 Cal. 73, more fully explained, *post*, same section.

[4] See Wadleigh *v.* Gilman, 12 Me. 403; Welch *v.* Hotchkiss, 39 Conn. 144; Vanderbelt *v.* Adams, 7 Cow. 349; Corp. of Knoxville *v.* Bird, 12 Lea, 121 (47 Am. Rep. 326); Ex parte Fiske, 72 Cal. 125; Matter of City

crease in the danger of a general conflagration, resulting from the construction of wooden buildings in the heart of a large city, furnishes ample justification for the regulation.

But the proprietor has the right to erect on his lands whatever kind of buildings or other structures he may please, provided he does not, in doing so, threaten, or do, harm to others; and, as long as he does not put others in danger, he may even set fire to his own house, without committing any punishable wrong.[1] While, therefore, it is lawful for the State to prohibit the erection of wooden buildings in thickly settled communities, because of the danger of fire, it would certainly not be lawful to apply the same regulation to suburban and country property, on which the buildings are far apart; for the danger of a general conflagration is reduced to so low a minimum, that, if the danger existed at all, it could not be appreciably increased by the erection of wooden buildings.

In California, a county ordinance, regulating the con-

of Brooklyn, 87 Hun, 54; Klinger *v.* Bickel, 117 Pa. St. 326; King *v.* Davenport, 98 Ill. 305. In the California case, the city ordinance provided that "no wooden building within the fire limit shall be altered, changed or repaired without permission of the fire wardens, etc. In the New York case in Hun's report, the regulation provided for the removal of a wooden building which had been erected in violation of the law; but the court held that this cannot be done without first giving the owner notice of the intended order of removal. In the case of Knoxvill *v.* Bird, a city ordinance, prohibiting the erection of wooden buildings, was sustained in its application to cases, in which a contract for the construction of the building was made before the passage of the ordinance, and remained unexecuted; the passage of the law against the erection of such buildings made illegal all contracts for their construction, and released all parties to the contracts from the obligations thereby assumed. But in the City of Buffalo *v.* Chadeayne, 134 N. Y. 163, it was held that where a person had, under a permit to erect frame buildings within the fire limits, granted by the proper authorities, made contracts and incurred liabilities in reliance upon such permit, the city cannot rescind such permit, without violating rights of property, which are under the protection of the constitution. See Cordes *v.* Miller, 39 Mich. 581 (33 Am. Rep. 330).

[1] Bloss *v.* Tobey, 2 Pick. 320; Hennesey *v.* People, 21 How. Pr. 239.

struction of asylums for the insane, required *inter alia*, that the building should be fire-proof, and composed of brick or stone, and that the grounds to which the patients should be accessible be surrounded by a brick wall, eighteen inches thick and twelve feet high. These requirements were held to be unconstitutional as an arbitrary exercise of the police power.[1]

Party walls are so common as the result of the mutual agreement of adjoining proprietors, that at first thought a law, which provided for the universal use as a party wall of one which is placed partly on each of the adjoining tracts of land, would not appear to be so unreasonable. Yet, there can be no question of the soundness of the judgment of the court in declaring such a law as an unconstitutional interference with the right of property of the adjoining proprietor, who did not consent to the construction of the party wall. The statute which was declared void in this case, provided that every person, building with brick or stone in the city of Boston, shall have the right to set half of his partition or party wall on the adjoining lot, and that when the adjoining proprietor builds upon his lot, he shall be required to pay to the constructor of the party wall the half of the expense, to the extent to which he shall make use of the wall.[2]

Somewhat akin to regulations of the construction of buildings, are the regulations which require and control the construction of fences. Fences are required in cities and towns, in order to secure privacy and the accurate determination of boundary lines; while in the country, the confinement of the cattle is the chief reason. Ordinarily, the requirements of a fence are so reasonable that there is no disposition to resist the enforcement of the regulation. There are, however, a few interesting cases, in which fence

[1] Ex parte Whitwell, 98 Cal. 73.

[2] Wilkins *v.* Jewett, 139 Mass. 29.

regulations have been resisted. For example, in Massachusetts, a statute was held to be reasonable which required the destruction as a nuisance of any fence, which exceeded six feet in height, which has been maliciously erected or maintained for the purpose of annoying the occupants of adjoining property.[1] It has also been held to be reasonable to prohibit in the construction of fences the use of any but smooth wire.[2]

A curious regulation of fences is found in Texas, which prohibits the construction of a continuous fence for more than three miles, without providing a gateway of the kind specified in the statute. Inasmuch as the requirement of such a gateway was to enable the public to cross the private property of one, the regulation was justly held to be repugnant to the constitution of Texas.[3]

The regulations, in regard to fences in the country, vary in different places. In some States and counties, where the agricultural interests are predominant, and the cattle-raising industry is small, the owners of cattle are required to fence their cattle; while the owners of agricultural lands are not required to incur the enormous expense of fencing in their tilled fields. Where, however, the cattle industry is predominant or very strong, the disposition is generally shown to require the fields to be fenced in, while the cattle is permitted to roam at large. Where there is such a conflict of interests, it is manifestly within the power of the legislature to determine on whom the burden of maintaining fences shall be imposed. And the courts have no power ordinarily to control or overrule the legislative determination. And the logical deduction would be that where the relative weights of the agricultural and cattle interests change, the legislature may change the existing requirements as to fencing,

[1] Rideout *v.* Knox, 148 Mass. 368.
[2] Commonwealth *v.* Barrett (Ky.), 17 S. W. 336.
[3] Dilworth *v.* State (Tex. Cr. Rep.), 36 S. W. 274.

and transfer the burden from one interest to the other, according as the highest interests of the community may best be promoted. But a recent case from one of the inferior Federal courts holds that any such change of policy, in regard to fencing of lands in the country, would be a taking of the property of the one, upon whom the burden of fencing was freshly imposed, in violation of the Federal Constitution.[1] I doubt whether this decision can be accepted as the settled opinion of the Federal courts.

In the construction of buildings nowadays, a serious and dangerous nuisance is suffered from the blasting of rock with explosive compounds. An ordinance of Boston prohibited such use of explosives within the city limits, and the ordinance was sustained as a reasonable exercise of police power.[2]

§ 151. **Regulation of the right to hunt game and to catch fish.**[3] — It is a very common police regulation, to be found in every State, to prohibit the hunting and killing of birds and other wild animals as well as to catch certain fish in certain seasons of the year, the object of the regulation being the preservation of these animals from complete extermination by providing for them a period of rest and safety, in which they may procreate and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be successfully questioned.

Where the prohibition was limited to the killing of game and the catching of fish in the public lands and streams of the State, no possible question could arise as to the constitutionality of the regulation, for the reason that no one's rights of property could be violated in such a case. The

[1] Smith *v.* Bivens, 56 Fed. 352.

[2] Commonwealth *v.* Parks, 155 Mass. 531.

[3] See *post*, § 155.

right to hunt or fish in such a case is at best only a privilege, which the State may grant or withhold at its pleasure. Thus, a statute is not unconstitutional, which prohibits the digging of clams by anyone who has not received a permit from the selectmen of the town.[1] But when, in the pursuit of the legislative determination to preserve game from extinction, the legislature goes further and prohibits at certain seasons the killing of game and the catching of fish on the private property of a citizen, the land owner's qualified property in wild animals is thereby interfered with, which is justifiable, if at all, only as a police regulation for the promotion of the public welfare. Although the constitutionality of these laws has been frequently contested in the past thirteen years, there has been no dissenting opinion to the judgment that these laws are a reasonable exercise of the police power.[2] A law is equally constitutional which prohibited hunting and fishing of certain game and fish for a stipulated number of years, in order to permit the moreactive propagation of the species.[3]

The prohibition of hunting and fishing and catching game and fish during the closed season, necessarily includes the sale of them. And, so far as the prohibition of their sale extends only to the game and fish which are caught within the State, the constitutionality of the prohibition cannot be seriously questioned. But the exceeding great difficulty of tracing the place of catching of the

[1] Commonwealth *v.* Hilton (Mass. '99), 54 N. E. 362.

[2] See, in addition to the cases cited in succeeding notes, State *v.* Geer, 61 Conn. 144; People *v.* Bridges, 142 Ill. 30; State *v.* Rodman, 58 Minn. 393; State *v.* Chapel, 64 Minn. 130; People *v.* Brooks, 101 Mich. 98; Roth *v.* State, 51 Ohio St. 209. The Massachusetts law permitted one who propagated fish in his own private waters to catch and eat them himself, but not to sell them, during the closed season. Commonwealth *v.* Gilbert, 160 Mass. 157. In South Carolina, it has been held that fish is included in the word *game* in the provision of the constitution, which authorizes the enactment of game laws. State *v.* Higgins, 51 S. C. 51.

[3] Hughes *v.* State, 87 Md. 298; State *v.* Theriault, 70 Vt. 617.

game and fish, which are offered for sale during the closed season, has induced the legislatures to prohibit their sale at those times, whether they have been caught and killed within or without the State. Some of the courts have held, that since the game laws are designed to preserve game within the State, they cannot be held to apply to the sale of game and fish which have been killed and caught elsewhere.[1] On the other hand, other courts have sustained the constitutionality of the game laws, in their prohibition of the game which may be imported from another State during the closed season. The fact, that the closed seasons are not the same in all the States, so that the sale of game might have been lawful in the exporting State, did not seem to have any weight against the law with these courts.[2]

The use of seines in the catching of fish is a most fruitful cause of the extinction of fish. For that reason, the use of them in the streams of the State is stringently prohibited in many of the States, with severe penalties and the direction, that the seines shall be promptly destroyed when found on or near the streams. Sometimes the character of the nets, which are allowed, and of those which are disallowed, is fully set forth in the statute. The constitutionality of these laws has been universally sustained, notwithstanding in some cases, as in New York, the penalties are unusually severe.[3]

[1] Commonwealth *v.* Hall, 128 Mass. 410; Commonwealth *v.* Wilkinson, 139 Pa. St. 298; Allen *v.* Young, 76 Me. 80.

[2] Magner *v.* People, 97 Ill. 320; N. Y Ass'n for Protection of Game *v.* Durham, 51 N. Y. Super. Ct. 306; State *v.* Rodman, 58 Minn. 393; Roth *v.* State, 51 Ohio St. 209; Commonwealth *v.* Gilbert, 160 Mass. 157; State *v.* Randolph, 1 Mo. App. 157; State *v.* Judy, 7 Mo. App. 524; Ex parte Maier, 103 Cal. 476; Stevens *v.* State (Md. '99), 43 A. 929.

[3] Lawton *v.* Steele, 119 N. Y. 226; Commonwealth *v.* Lohman, 8 Kulp, 485; People *v.* Bridges, 142 Ill. 30; Hughes *v.* State, 87 Md. 298; Bittenhaus *v.* Johnston, 92 Wis. 588; State *v.* Woodard, 123 N. C. 710; Peters *v.* State, 96 Tenn. 682; State *v.* Mrozinski, 59 Minn. 465; State *v.* Lewis, 134 Ind. 250; Lewis *v.* State, 148 Ind. 346; Osborn *v.* Charlevoix, Circuit Judge, 114 Mich. 655.

Another comparatively common regulation, also designed to preserve game from extinction, is that which prohibits the export of game, fish or oysters from the State. These regulations have been sustained, wherever they have been established.[1]

All laws, regulative of the pursuit of game or fish, must operate impartially upon all persons. A law, which tended to give to a few a special privilege in game, or which only excluded a few persons, would be unconstitutional.[2]

§ 152. **Abatement of nuisances — Destruction of buildings.** — Nuisances may always be abated. The fact of being a nuisance having been established, the thing may be destroyed, removed, or so regulated that it will cease to be a nuisance. In certain cases of extreme necessity, the private individual may, without the aid of government, abate or remove the nuisance ; in other cases, the government must through its proper department interfere. But in all these cases the interference with the enjoyment of private property, whether by the State or by the individual, must be justified by the proof of two facts, viz. : first, that the property, either *per se* or in the manner of using it, is a nuisance, and secondly, that the interference of the State does not extend beyond what is necessary to correct the evil. To extend the exercise of the power of abatement, beyond the point of necessity, would make the interference unlawful. But for the purpose of removing a nuisance, the State may go to any length, even so far as to destroy houses and other buildings, where they are in fact nuisances. If a house is falling into decay, and endangering the public safety, or it is irretrievably unhealthy, and consequently threatening

[1] State *v.* Geer, 61 Conn. 144; State *v.* Chapel, 64 Minn. 130; Organ *v.* State, 56 Ark. 267; State *v.* Harrub, 95 Ala. 176; State *v.* Melvin, 95 Ala. 176.

[2] Hughes *v.* State, 87 Md. 298; State *v.* Higgins, 51 S. C. 51; Walker *v.* Stone, 17 Wash. 578; 50 P. 488.

evil to the public health,[1] or is *per se*, for any other reason, a nuisance, such as privy vaults without outlets,[2] it may certainly be destroyed; and it is not unusual to find municipal regulations of this character. And where such property is lawfully destroyed, the owner cannot claim compensation for its destruction.[3]

But where the nuisance consists not in the building itself, but in the use to which it is put, the building cannot be destroyed. The interference by the State must be confined to the prohibition of the wrongful use. A good illustrative case is to be found in the Michigan reports. The city of Detroit passed an ordinance providing for the demolition of all buildings used for the purpose of prostitution. It was no doubt thought that, apart from being a severe punishment to the owners of the houses for letting them for this unlawful purpose, it would be a most effective effort to suppress the social vice, by destroying the buildings best adapted for carrying on the immoral trade. Whatever good motive may have induced the enactment of the ordinance, it was clearly unconstitutional, as being an interference with private property beyond what was necessary to abate or remove the nuisance, and such was the opinion of the Supreme Court of Michigan. In delivering its opinion, the court said: "It is said that the house was a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill-fame. That which constitutes or causes the nuisance may be removed; thus if a house is used for the purpose of a trade or business, by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary

[1] Theilan *v.* Porter, 14 Lea, 622 (52 Am. Rep. 173).

[2] Harrington *v.* City of Providence, 20 R. I. 233. In this case, what would otherwise have appeared to be an unreasonable requirement, was justified by the fact that the sewerage system of the city made the continued maintenance of the vaults unnecessary.

[3] Dunbar *v.* City of Augusta, 90 Ga. 390.

to prevent the exercise of such trade or business; so a house in which gaming is carried on, to the injury of the public morals; the individual by whom it is occupied may be punished by indictment and the implements of gaming removed; and a house in which indecent and obscene pictures are exhibited is a nuisance, which may be abated by the removal of the pictures. Thousands of young men are lured to [some of] our public theaters, in consequence of their being a resort, nightly, of the profligate and abandoned; this is a nuisance. Yet in this and in the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that to suppress the nuisance such an act was unnecessary. So in the case before us the nuisance was not caused by the erection itself, but by the persons who resorted there for the purpose of prostitution. The authority given to the town to suppress bawdy houses does not support and authorize an ordinance directing the demolition of buildings, in which such nuisance is committed." [1]

§ 153. **How far use of land may be controlled by requirement of license?** — Inasmuch as certain uses, to which lands may be put, require police regulation and supervision, in order to prevent the threatened public injury, by bringing those cases within the strict control of the police, it is quite reasonable for the State to require the issue of licenses, before it is lawful to do those things upon the land, which are likely to endanger the public welfare in any way. For example, in order to enforce the law against the erection or enlargement of wooden buildings, it would be reasonable to require a permit or license, before one can lawfully make any improvement or repairs to his buildings.[2]

[1] Welch *v.* Stowell, 2 Dougl. (Mich.) 332; see State *v.* Saunders, 66 N. H. 39.

[2] Welch *v.* Hotchkiss, 39 Conn. 140 (12 Am. Rep. 383); Ex parte Fiske, 72 Cal. 125; Welch *v.* Hutchins, 39 Conn. 140. But see Newton *v.* Belger, 143 Mass. 598.

In the same manner may the city require a license or permit to construct any kind of building, so that it may take the proper precautions against the danger to the public, resulting from house-building. This is a very common police regulation. The requirement of a license and of a small license fee, large enough to cover the cost of issuing the license, and of maintaining the necessary police supervision, cannot be questioned in any case where the act or thing, for which the license is required, contains some element of danger to the public. For example, an ordinance is valid and reasonable, which prohibits the moving of a building, unless a license has first been obtained.[1] So, also, has it been held to be reasonable for the State to prohibit the erection of stables for the accommodation of more than four horses, without a license from the board of health.[2]

All such uses of lands are subject to police regulation, and the legislature is the supreme judge of the kind of regulation that the public welfare requires, subject only to the power of the court to confine all police regulations to the prevention of the threatened public injury. But one does not need any license from the State, nor can he be required to procure one, to make a harmless use of his lands. His right to use them is a natural right, which he possesses independently of positive or statutory law.[3] As has been already fully explained,[4] a license, strictly so-called, is an authority to do that, which on account of its possible danger to the public is subjected to police regulation, and which for that reason is rightly declared to be unlawful without the license. It is not required of the

[1] City of Eureka *v.* Wilson, 15 Utah, 53, 67 (48 P. 41, 150).

[2] City of Newton *v.* Joyce, 166 Mass. 83.

[3] See Ah He *v.* Crippen, 19 Cal. 491; Ah Lew *v.* Choate, 24 Cal. 562, in which it was held that a man's right to mine on his own land cannot be controlled by the imposition of a license.

[4] See *ante*, § 119, in which the whole subject of licenses, as distinguished from taxation, is exhaustively treated.

individual for the purpose of increasing the revenues of the city or State, although the public treasury may be benefited incidentally by the exaction of a license fee. It is a police regulation, which is only justifiable when it is instituted to avert or regulate some threatened public injury. And the regulation must be reasonable, and one which can be complied with by any one having the requisite means. Where, for example, the regulation is prompted by the spirit of hostility to a class, such as the Chinese are esteemed in California, and is so framed as to exclude them and not others from pursuing lawful and harmless business, such as laundering, the regulation will be declared to be void, because it is unreasonable and goes beyond the requirements of the public welfare. Thus, a town ordinance prescribed that no one shall carry on the business of laundering, except in certain blocks therein named, without the permit of the board of trustees, and prohibited the issue of the permit, unless the person applying for it shall have obtained the consent of a majority of the property owners on the block, in which it is proposed that the business shall be conducted. The ordinance was held to be unreasonable and unconstitutional.[1]

While it is probably true that a license tax, as a tax, in the absence of special constitutional restrictions, may be imposed upon a particular use of lands, as upon certain trades and occupations, which are in no way likely to prove harmful to the public; the license tax must be tested by the consideration of the constitutional restrictions upon the power of taxation; and where a municipal corporation has not the power under its charter to impose a license tax as a tax, it cannot impose it as a police regulation upon those who do not make use of their lands in any dangerous manner.[2]

[1] Ex parte Sing Lee, 96 Cal. 354.

[2] State *v.* Hoboken, 33 N. J. 280. In this case the ordinance directed that owners of land should be assessed a certain amount for the

§ 154. **Improvement of property at the expense and against the will of the owner.** — It has long been an established rule of law, and it is still so in the absence of a modifying statute, that the owner of lands is not responsible for any annoyance or discomfort, proceeding from some natural cause, and not from the act of some individual; and he cannot be made to respond in damages for his failure to remove the cause of annoyance, even though the public health of the neighborhood is seriously affected. Thus the owner of swamp lands cannot be held responsible for the injury to the health of the neighbors, caused by the deadly exhalations of his swamp. The owner of land is responsible for the injury or annoyance flowing from the construction of artificial swamps, and the keeping of stagnant water; but he is, independently of statute, under no obligation to drain a natural swamp, in order to improve the public health of the community.[1] It cannot be questioned that the owner of swamps or other unhealthy lands may be compelled to allow them to be drained, and to be otherwise cleared of things which affect the public. For while the owner of lands is not responsible for the continuance of a natural nuisance, he has no indefeasible right to its continuance; and the State may remove such a nuisance, with or without the owner's consent, provided the expense of removing it is borne by the State and not imposed upon the owner. In many of the States, statutory provisions have been made for the compulsory drainage of swamp lands, and the only cause for disputing the constitutionality of such legislation is the provision that the entire cost of drainage shall be imposed upon the owner. The constitutionality of such legislation has, as a reasonable exercise of

privilege of building vaults in front of their dwellings. It was held to be no license in the sense of being a police regulation, and, as a license tax, it could not be referred to the charter power to "regulate" the construction of such vaults. But see *ante*, § 119.

[1] Reeves *v.* Treasurer, 8 Ohio St. 333.

the police power of the State, been generally sustained,[1] on the general ground that the State may impose upon the owner the duty of draining his low lands, in consideration of the consequent increase in the value of his lands. The Supreme Court of Wisconsin justifies such legislation in the following language: "It would seem to be most reasonable that the owners of the lands drained and reclaimed should be assessed to the full extent, at least of his special benefits, for he has received an exact equivalent and a full pecuniary consideration therefor, and that which is in excess of such benefits should be paid on the ground that it was his duty to remove such an obvious cause of malarial disease and prevent a public nuisance. The duty of one owner of such lands is the duty of all, and in order to effectually enter upon and carry out any feasible system of drainage through the infected district, all such owners may be properly grouped together to bear the general assessment for the entire cost proportionably. Assessment in this and similar cases is not taxation."[2] The cases generally sustain the position of the Wisconsin court, and justify the imposition upon the owner of the entire cost of drainage, whether it exceeds or falls within the special benefits he receives from the drainage; but in New Jersey it has been definitely settled that the assessment upon land owners for the drainage of the low lands must be limited to the amount of special

[1] Donnelly *v.* Decker, 58 Wis. 461 (46 Am. Rep. 637); Norfleet *v.* Cromwell, 70 N. C. 634 (16 Am. Rep. 787); Anderson *v.* Kerns, 14 Ind. 199; O'Reilly *v.* Kankakee Val. Draining Co., 32 Ind. 169; Draining Co. Case, 11 La. Ann. 338; Woodruff *v.* Fisher, 17 Barb. 224; French *v.* Kirkland, 1 Paige, 111; Williams *v.* Mayor of Detroit, 2 Mich. 560; Phillips *v.* Wickham, 1 Paige, 590; Sessions *v.* Crunkleton, 20 Ohio St. 349; Bancroft *v.* Cambridge, 126 Mass. 438; Dingley *v.* Boston, 100 Mass. 544; Davidson *v.* New Orleans, 96 U. S. 97; Wurts *v.* Hoagland, 114 U. S. 606; Horbach *v.* City of Omaha, 54 Neb. 83; Hadgar *v.* Supervisors, 47 Cal. 222; Yeomans *v.* Riddle, 84 Iowa, 147; Fries *v.* Brier, 111 Ind. 65; Laverty *v.* State, 109 Ind. 217; Petition of Cheesebrough, 78 N. Y. 235; Smith *v.* Carlow, 114 Mich. 67.

[2] Donnelly *v.* Decker, 58 Wis. 461 (46 Am. Rep. 637).

benefits so imparted to them, and any additional assessment is unconstitutional.[1] All the cases agree that the compulsory drainage is never justifiable except when the public health requires it. It can never be ordered purely for private gain."[2]

If it be conceded that the owners of low lands are under a legal obligation to remove from their lands all natural as well as artificial causes of injury to the public health, it

[1] Pequest Case, 41 N. J. L. 175; Tidewater Co. *v.* Coster, 3 C. E. Green, 518; State *v.* Driggs Drainage Co., 45 N. J. L. 91. "The owners of these lands could not be convicted of maintaining a public nuisance because they did not drain them; even though they were not the owners of the lands upon which the obstructions are situated. It does not appear by the act or the complaint that the sickness to be prevented prevails among inhabitants of the wet lands, nor whether these lands will be benefited or injured by draining; and certainly, unless they will be benefited, it would seem to be partial legislation to tax a certain tract of land, for the expense of doing to it what did not improve it, merely because, in a state of nature, it may be productive of sickness." Woodruff *v.* Fisher, 17 Barb. 224.

[2] State *v.* Driggs Drainage Co., 45 N. J. L. 91. In Woodruff *v.* Fisher, 17 Barb. 224, the court say: "If the object to be accomplished by this statute may be considered a public improvement, the power of taxation seems to have been sustained upon analogous principles. Citing People *v.* Mayor, etc., of New York, 4 N. Y. 419; Thomas *v.* Leland, 24 Wend. 65; Livingston *v.* Mayor, etc., of New York, 8 Wend. 85 (22 Am. Dec. 622). But if the object was merely to improve the property of individuals, I think the statute would be void, although it provided for compensation. The water privileges on Indian River cannot be taken or affected in any way solely for the private advantage of others, however numerous the beneficiaries. Several statutes have been passed for draining swamps, but it seems to me that the principle above advanced rests upon natural and constitutional law. The professed object of this statute is to promote public health. And one question that arises is, whether the owners of large tracts of land in a state of nature can be taxed to pay the expense of draining them, by destroying the dams, etc., of other persons away from the drowned lands, and for the purposes of public health. This law proposes to destroy the water power of certain persons against their will, to drain the land of others, also, for all that appears against their will; and all at the expense of the latter, for this public good. If this taxation is illegal, no mode of compensation is provided, and all is illegal." See Priewe *v.* Wisconsin State Land and Improvement Co., 93 Wis. 534.

cannot be denied that the State may, by appropriate legislation, compel the performance of this duty; and if the land owner refuses to drain his land, to drain it for him and compel him to reimburse the State for the entire cost of drainage, whatever relation it bears to the increase in the value of the land. The burdensome character of the duty does not affect the obligation to perform it, and it would not be unconstitutional to impose upon the land owner the payment of the costs of drainage, in excess of the special benefits he has received from the improvement. On the other hand, if it be true that there is no natural obligation upon the land owner to remove from his land all nuisances produced by natural causes, the entire cost of compulsory drainage cannot be imposed by statute upon those who own such lands at the time when the statute was enacted. The State may in the grant of its public lands impose upon the purchaser whatever conditions and duties the public welfare may seem to demand; and so, likewise, may the State provide that all future purchasers of swamps and other low lands shall drain them of the stagnant water, for in both cases there is no interference with vested rights, which our constitutions prohibit. But it is an unconstitutional interference with vested rights, to impose this statutory obligation upon those who possess such lands when the statute was adopted. Providing for the limitation of the assessment on the land owner to the amount of special benefit received by him from the drainage, is an attempt to make an equitable adjustment of what would otherwise be a clear violation of the rights of property; but it is altogether illogical and untenable. It is as much a violation of the rights of property to compel the owner to pay for improvements to his lands, which he did not order and does not want, as to impose on him the entire cost of removing a natural nuisance, which it was not his duty to abate. The State has the right, either to impose on the land owner the payment of the entire cost of drainage, or to exact nothing.

As taxation, this special assessment would seem to offend the constitutional provisions, which require that all taxation shall be equally distributed.[1]

It is, however, a different question, whether in draining swamp and lowlands, adjoining lands can be subjected to the burden of the necessary drains, without the payment of compensation to the owners of such lands. That the lands may for that purpose be so condemned, seems to be undisputed.[2] But compensation must be paid to the owners, as in any other taking of property for a public use.[3]

Ordinarily, the power to establish and regulate the system of drainage and sewerage, is granted to the government of a city, town or county. But this is not necessary; and the legislature has the power in its discretion to establish sanitary and sewerage districts, without any regard to the boundaries of cities and counties, and to invest the power of control in a specially created body.[4] Nor is it necessary, in the formation of drainage districts, that the drainage laws should be made uniform throughout the State.[5]

In the arid portions of the Far West, notably in California, vast deserts of valueless lands have been reclaimed and made as fertile and valuable as other lands by the establishment of systems of artificial irrigation. Inasmuch as the water for purposes of irrigation has in many cases to be brought from a distance, and the distribution of the water requires governmental supervision, the legislature of California has established irrigation districts, and vested the control of the system of irrigation in a local board of

[1] See *post*, § 160.

[2] State *v.* Sparrow, 89 Mich. 263.

[3] People *v.* Henlon, 64 Hun, 471; Matter of Ryers, 72 N. Y. 8; Matter of Cheesebrough, 78 N. Y. 235; Fleming *v.* Hull, 73 Iowa, 598; Askam *v.* King County, 9 Wash. 1.

[4] Kingman *v.* Metropolitan Sewerage Com'rs, 153 Mass. 566; State *v.* Flower, 49 La. Ann. 1199; Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554.

[5] Bryant *v.* Robbins, 70 Wis. 258.

commissioners, giving them the power to issue bonds in the name of the irrigation district, subject to the approval of the inhabitants of the district. This legislation has been contested; but it has been sustained in a number of cases as a constitutional exercise of the police power.[1] Similar legislation has been sustained in Nebraska and Colorado.[2]

Another case, in which the government is held to be empowered by the constitution to compel land owners to improve their property at their own expense, is where the land is naturally low, or the owner has made excavations, as in the case of stone quarries. Wherever the condition of the land from either of these causes is a public nuisance, the State, or the city by delegation of power, may require the owner to fill it up at his own expense.[3]

It is not an unfrequent thing for the owners of property in cities and towns to be required by ordinance to keep the adjoining sidewalk free from snow, ice and other obstructions. In New York the ordinance was resisted as an unconstitutional exercise of police power, but it was sustained.[4]

A peculiar case of taking of lands of private owners for the benefit of a community arose in Louisiana. The river had washed away a portion of a roadway which extended along the banks. The city of New Orleans required the riparian proprietors, to set his boundaries

[1] Irrigation Dist. *v.* Williams, 76 Cal. 360; Irrigation District *v.* De Lappe, 79 Cal. 351; In re Bonds of Madera Irrigation Dist., 92 Cal. 296; In re Central Irrig. Dist., 117 Cal. 382; Fallbrook Irrigation Dist. *v.* Bradley, 164 U. S. 112.

[2] See Board of Directors of Alfalfa Irrigation Dist., 46 Neb. 411; Farmers' Independent Ditch Co. *v.* Agricultural Ditch Co., 22 Colo. 513.

[3] Nickerson *v.* Boston, 131 Mass. 306; City of Rochester *v.* Simpson, 134 N. Y. 414; Board of Health *v.* Copcutt, 140 N. Y. 12; City Council of Charleston *v.* Werner, 38 S. C. 488; *s. c.* 46 S. C. 323. In the last case, he expense to the owner of the land was limited to one-half of the value of the land.

[4] Village of Carthage *v.* Frederick, 122 N. Y. 268. But see Gridley *v.* City of Bloomington, 88 Ill. 554.

back sufficient to restore the road to its original width without providing for any compensation for the lands so taken. This was held to be a constitutional exercise of the police power.[1]

§ 155. **Regulation of non-navigable streams — Fisheries.** — Where two tracts of land are divided by a navigable stream, the general rule is that the boundary line is the low water mark on the adjoining shore, and the soil or bed of the stream is the property of the State.[2] But if the stream is not navigable, the boundary line is the center of the current of the stream, commonly called the *filum aquæ*, and the owners of the shore have a right of property in the bed of the stream up to this *filum aquæ*. In neither case does any one acquire any exclusive right of property in the stream of water. The riparian owner, in the case of a non-navigable stream, may make a reasonable use of the water, even appropriating absolutely a portion of it, in the form of water or of ice, but no one has a right to assume absolute control of the stream, unless from beginning to end it lies wholly within his lands. Where a non-navigable stream passes over the lands of two or more adjacent owners, the adjacent riparian owners have mutual easements upon the soil of each for the free and unrestricted flow of the water. The riparian owners have the right to use the water to a reasonable extent, but cannot so use it as to diminish the flow or corrupt the water.[3] It may be said with truth that almost any use of a stream of water is likely to corrupt it, and, in the absence of statutory regulation, what is and what is not a lawful use of the stream, is a judicial

[1] Ruch *v.* City of New Orleans, 43 La Ann. 275.

[2] As to what is, and is not, a navigable stream, see Tiedeman on Real Property, § 835; 1 Washb. on Real Prop. 413; and cases cited in these treatises.

[3] Washburn *v.* Gilman, 64 Me. 163 (18 Am. Rep. 246); Richmond Manuf. Co. *v.* Atlantic Delaine Co., 10 R. I. 106 (14 Am. Rep. 658); Jacobs *v.* Allard, 42 Vt. 303 (1 Am. Rep. 331).

question, to be determined by the consideration of the circumstances of the case, including the economic necessities and industries of the community through which the stream passes.

The maintenance of a tannery or saw mill may not be a nuisance in one locality, while it may be considered one in some other locality. And, independently of statute, if the riparian proprietors make a certain use of a stream for some time, the fact that it renders the stream unfit for another use, which some other riparian owner wishes to make of it, does not make the customary use of the stream a nuisance. But the legislature may, in consideration of the public interest, prohibit any use of a non-navigable stream, which interferes with another use of it, when the public welfare demands that the stream should be adapted to the latter use. Thus, an act of the legislature was declared to be constitutional, which prohibited the use of all streams entering into a reservoir, in any way that would pollute or corrupt the water.[1] But it can hardly be doubted that, if such a stream had been previously used in connection with a tannery, or other business, which would render the water of the stream unfit for drinking purposes, the subsequent establishment of a reservoir, drawing its water from this stream, and the prohibition of the tannery or other like business, could not be sustained, so far as the prohibition or destruction of the objectionable business is concerned, unless provision was made for payment of compensation to the owner of the tannery or other like business for the loss he has thus sustained. Such a prohibition would be a taking of private property for a public use, within the meaning of the constitutional provision, which requires the payment of compensation for the property so taken.

[1] State *v.* Wheeler, 44 N. J. L. 88. See State *v.* Griffin (N. H.), 39 A. 260.

The riparian owner is prohibited from erecting or maintaining a dam across the stream, and causing an overflow of the land above or diminishing the volume of the stream below.[1] But whenever the public welfare requires it, or it serves in any way to promote the public good, the legislature may authorize the construction and maintenance of such dams, provided compensation is made to all riparian proprietors, who may have been injured thereby.[2] While the maintenance of a dam, without legislative sanction and without the consent of the riparian owners, is a trespass, if made and maintained for the statutory period of limitation under a claim of right to do so, an absolute right to its maintenance may thus be acquired; and it has been held that one, who has maintained a dam across a non-navigable stream for twenty-one years, cannot be required by statute to construct and maintain a passage-way over the same for fish.[3] The owner of the dam cannot be compelled at his own expense to maintain this passage-way, but the State can undoubtedly authorize those, who may be thereby benefited, to construct the passage-way at their expense, taking care to compensate the owner of the dam for whatever damage he has suffered.[4]

The establishment of wharves, extending into the stream

[1] Sampson *v.* Hoddinot, 1 C. B. (N S.) 590; Colburn *v.* Richards, 13 Mass. 420; Anthony *v.* Lapham, 5 Pick. 175. See St. Anthony's Falls Water Co. *v.* St. Paul, 168 U. S. 349; Minneapolis Mill Co. *v.* St. Paul, 168 U. S. 349.

[2] Lee *v.* Pembroke Iron Co., 57 Me. 481 (2 Am. Rep. 59); Gray *v.* Harris, 107 Mass. 492 (9 Am. Rep. 61); Proctor *v.* Jennings, 6 Nev. 83 (3 Am. Rep. 240).

[3] Woolever *v.* Stewart, 36 Ohio St. 146 (38 Am. Rep. 566). But see State *v.* Beardsley (Iowa, '99), 79 N. W. 138, in which a statute, which required owners of dams to maintain a fish-way for the free passage of fish, and to abate the dam as a nuisance, if such fish-way is not maintained, was sustained, even when enforced against the proprietor of a dam which had been maintained for twenty-three years, and he owned the land on the opposite shores.

[4] Commonwealth *v.* Pa. Canal Co., 66 Pa St. 41 (5 Am. Rep. 329).

of a navigable river, is always subject to police regulation and prohibition; and one would suppose that this would be open to no constitutional objection, in any case in which the title to the bed of the stream is in the State. It would seem, however, to be different, if the stream were non-navigable. In such a case, a law, prohibiting the driving of piles in the river, would be an unconstitutional taking of private property, unless it could be shown that damage results to the riparian proprietors above or below.[1]

It is not permissible at common law to divert a stream from its regular channel, if by so doing injury results to the owners above or below.[2] Water may be diverted from the channel for any reasonable use, but it can only be detained as long as it is necessary and reasonable, and it must be returned to the channel before it passes to the land of the riparian proprietor below.[3] But what would otherwise be an unlawful or unreasonable diversion or detention of the stream may be legalized by legislative authorization, upon payment of compensation for all damage suffered by the other riparian owners.

Another, sometimes valuable, right of property in non-navigable streams, which may be subjected to police regulation, is the right to catch the fish of the stream. The riparian owners have the right to fish on their own banks, and in any part of the stream which lies within their boundary line. Unless the catching of fish is conducted with reason, either the fish may be altogether exterminated, or the enjoyment of the right by one may interfere with the equal enjoyment of the right by others. For the protection of the fish, and for the maintenance of equality in respect to

[1] City of Janesville *v.* Carpenter, 77 Wis. 288.

[2] Elliott *v.* Fitchburg R. R. Co., 10 Cush. 191; Macomber *v.* Godfrey, 108 Mass. 219 (11 Am. Rep. 349); Tuthill *v.* Scott, 44 Vt. 525 (5 Am. Rep. 301).

[3] Clinton *v.* Myers, 46 N. Y. 511 (7 Am. Rep. 373); Arnol *v.* Foot, 12 Wend. 330; Miller *v.* Miller, 9 Pa. St. 74; Pool *v.* Lewis, 46 Ga. 162 (5 Am. Rep. 526).

the right to fish, the State can rightly regulate fisheries, providing that the regulations are reasonable, and do not extend beyond the prevention of the threatened injuries.[1]

§ 156. **Conversion of non-navigable into navigable streams.** — Whether a stream is a navigable or a non-navigable stream, must be determined by a consideration of its condition in a state of nature. A stream that is unnavigable in fact cannot, by dredging and the removal of obstructions, be converted into a navigable stream so as to affect the rights of the riparian owner in the stream or in its bed, except in the exercise by the State of the right of eminent domain. The conversion of a non-navigable into a navigable stream would be a taking of private property for a public use, which is only possible on payment of full compensation to the riparian owners.[2] It is sometimes supposed that in the case of Carondelet Canal & Navigation Co. *v.* Parker,[3] the State undertook to convert a non-navigable into a navigable stream without payment of compensation to the riparian owners, and in the syllabus of the case as reported in the American Reports, it is stated that the State may authorize a private corporation to convert an unnavigable stream into a navigable stream, and charge tolls for the improvements. But a careful study of the case will reveal the fact that the bayou St. John was really in legal

[1] See Holyoke Co. *v.* Lyman, 15 Wall. 500; Commonwealth *v.* Chapin, 5 Pick. 199; Commonwealth *v.* Essex Co., 13 Gray, 247; Weller *v.* Snover, 42 N. J. L. (13 Vroom), 341; Doughty *v.* Conover, 42 N. J. L. (13 Vroom), 192. In the last case, the statute under consideration prohibited the use of fishing nets at certain times of the year in particular counties. See, also, Commrs. of Inland Fishing *v.* Holyoke Water Power Co., 104 Mass. 446 (6 Am. Rep. 247). See, also, *ante*, § 151.

[2] See Hathorn *v.* Stinson, 12 Me. 183; Bradley *v.* Rice, 13 Me. 200; Waterman *v.* Johnson, 13 Pick. 261; Wood *v.* Kelley, 30 Me. 47; Paine *v.* Woods, 108 Mass. 170, in which it has been settled that if a natural pond or lake is raised by artificial means, the boundary line will continue to be at low water mark of the pond in its natural state.

[3] 29 La. Ann. 430 (29 Am. Rep. 339).

contemplation a navigable stream, although practically unnavigable for most if not all commercial purposes.

But, on payment of compensation, the right of property in a non-navigable stream may be forfeited by its conversion into a navigable stream, in the same manner as all other rights of property in lands must fall under the exercise of the right of eminent domain. Thus, where a State constitution prescribes, contrary to the prior existing law, that the title to the beds of navigable streams up to high water mark shall be in the State, and that such beds shall never become the property of any private owner; the constitutional provision will not be permitted to operate so as to deprive the owner of a wharf, whose existence antedated the adoption of this constitutional provision, of his property therein, except in the exercise of the right of eminent domain and upon the payment of full compensation.[1]

The regulation of the use of navigable streams is as clearly within the police power of the State as is that of the highways. Navigable streams are the public waterways of the country.[2] The power to regulate is limited only by the constitutional requirements of uniformity and equality and of reasonableness. Thus a State may, in permitting the floating of logs down a navigable stream, institute all needful and reasonable regulations which will prevent the obstruction of the ordinary navigation of the stream and damage to other craft and the shore.[3] And where dams and sluices are permitted to be constructed by a milling company on a navigable stream, the State has the power to impose regulations, subsequent to the grant of the right, which are necessary to prevent the interference with the ordinary rise of the stream.[4]

[1] Yesler *v.* Board of Harbor Line Com'rs, 146 U. S. 646.

[2] See *post*, §§ 223–225 for a very full discussion of such regulations.

[3] Crane Lumber Co. *v.* Bellows, 117 Mich. 482.

[4] St. Anthony's Falls Water Co. *v.* St. Paul, 168 U. S. 349; Minneapolis Mill Co. *v.* St. Paul, 168 U. S. 349.

§ 157. **Statutory liability of lessors for the acts of lessees.** — Independently of statute, the lessor is not in any manner responsible for the wrongful acts of his lessee. The owner of an estate for years in lands is, during the continuance of the tenancy, as independent an owner, so far as the liability to the State or to the individual is concerned, as the tenant in fee. Certain uses of lands may be prohibited, because of their injurious effect upon the person or property of others, and the doing of such acts at once becomes unlawful. The State may punish the wrongdoer by the imposition of penalties or otherwise, and the individual who has suffered damage in consequence of the wrongful act, may recover damages of him in the proper action.

It is often a difficult matter to secure the enforcement of a public regulation, particularly if it concerns the manner of using premises, which does not involve a direct trespass upon the rights of others. Inasmuch as the proprietor of lands is only a tenant of the State, the terms and conditions of whose tenancy may be so regulated as that the public good may not suffer, the State may impose upon the landlord the duty of securing the enforcement of the law in respect to the prohibited use of the premises, by imposing on him a penalty for leasing his lands with the intent or knowledge that the premises will be used for unlawful purposes; and the State may also provide it to be his duty, as well as right, to enter upon the land for the purpose of forfeiting the lease, whenever it comes to his knowledge that the lessee is making an unlawful use of the premises. The performance of this police duty may become very burdensome, but the constitutionality of the law which imposes it cannot be questioned. Thus it has been held to be reasonable to impose a penalty on the owner of a house for permitting his house to be used for prostitution.[1] But

[1] McAlister *v.* Clark, 33 Conn. 91; People *v.* Erwin, 4 Den. (N. Y.) 129; Territory *v.* Dakota, 2 Dak. 155.

while the State may impose this police duty upon the lessor to prevent the lessee from making an unlawful use of the premises, he can only be required to exercise reasonable care in the performance of the duty; and his responsibility under such statutes is confined to those cases in which he has actual knowledge of the wrongful use of the property.[1] It is furthermore true, that the State cannot, in imposing this police duty, as was done in one case by the New York legislature, declare the lessor to be responsible to third persons who may have been damaged by the unlawful use of the premises. The New York statute, just referred to, created a cause of action for damages, in favor of the person or property which was damaged by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with the knowledge that intoxicating liquors were to be sold thereon. The act was declared by the New York Court of Appeals to be constitutional,[2] but we hope to show that it was an amazing, and altogether unconstitutional, interference with civil liberty and private property. The language of the court indicates that they appreciated the practical scope and effect of the statute, and it will be profitable for the reader to quote from the opinion of the court, in describing the character of this piece of legislation. The court say: "To realize the full force of this inquiry it is to be observed that the leasing of premises to be used as a place for the sale of liquors is a lawful act, not

[1] State *v.* Frazier, 79 Me. 95; State *v.* Smith, 15 R. I. 24; People *v.* O'Melia, 67 Hun, 653; Troutman *v.* State, 49 N. J. L. 33; Hornsby *v.* Raggett (1892), 1 Q. B. 20; Fisher *v.* State, 2 Ind. App. 365; Borches *v.* State, 31 Tex. Cr. 517; Swaggart *v.* Territory (Okl. 1898), 50 P. 96.

[2] Bertholf *v.* O'Reilly, 74 N. Y. 509 (30 Am. Rep. 323). Somewhat similar to the New York statute, which is so fully discussed in the text, but not so important, is the Ohio statute, which creates, in favor of the government, a lien upon the real estate, to secure the payment of the liquor license. Anderson *v.* Brewster, 44 Ohio St. 576.

prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful, that is, whether it was authorized by the license law of the State, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. Although the person to whom the liquor is sold is at the time apparently a man of sober habits, and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to person or property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the act is of a very sweeping character, and may in many cases entail severe pecuniary liability; and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may under the act be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drunk on the premises of the seller. There is no way by which the owner of real property can escape possible liability for the results of intoxication, where he leases or

permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on upon the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drunk on the premises or to be carried away and used elsewhere." In declaring the act to be constitutional, the court continue: "There are two general grounds upon which the act in question is claimed to be unconstitutional; first, that it operates to restrain the lawful use of real property by the owner, inasmuch as it attaches to the particular use a liability, which substantially amounts to prohibition of such use, and as to the seller, imposes a pecuniary responsibility, which interferes with the traffic in intoxicating liquors, although the business is authorized by law; and, secondly, that it creates a right of action unknown to the common law and subjects the property of one person to be taken in satisfaction of injuries sustained by another, remotely resulting from an act of the person charged, which act may be neither negligent nor wrongful, but may be in all respects in conformity with the law. * * * The right of the State to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The State may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication. * * * It is quite evident that the act of 1873 may seriously interfere with the profitable use of real property by the owner. This is especially true with respect to a building erected to be occupied as an inn or hotel, and especially adapted to that use, where the rental value may largely depend upon the right of the tenant to sell intoxicating liquors. The owner

of such a building may well hesitate to lease his property when by so doing he subjects himself to the onerous liability imposed by the act. The act in this way indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value. But this is not a taking of his property within the constitution. He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the act imposes. The objection we are now considering would apply with greater force to a statute prohibiting, under any circumstances, the traffic in intoxicating liquors, and as such a statute must be conceded to be within the legislative power, and would not interfere with any vested rights of the owner of real property, although absolutely preventing the particular use, *a fortiori* the act in question does not operate as an unlawful restraint upon the use of property. * * * The act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose on one man the liability for an injury suffered by another, with which he has no connection. But it may change the rule of the common law which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the act of 1873. That there is or may be a relation in the nature of cause and effect, between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given, is

apparent, and upon this relation the legislature has proceeded in enacting the law in question. It is an extension by the legislature of the principle, expressed in the maxim *sic utere tuo ut alienum non lædas* to cases to which it has not before been applied, and the propriety of such an application is a legislative and not a judicial question." [1]

Conceding that the sale of intoxicating liquors may be prohibited altogether, or subjected to whatever other police regulations the legislature may see fit to impose, and this we do not admit to be true, without most material qualifications,[2] the claim is still made that this kind of legislation is unconstitutional. The State may impose upon the lessor the police duty of preventing, as far as it lies in his power, the lessee from making an unlawful use of the premises, and may impose upon him penalties for his failure to eject the lessee. This is a legitimate police regulation. It is simply compelling the owner of property to perform a duty to the public which no one can do so well as he; and he cannot complain if the profits of his property have been diminished by the regulation. Neither he nor his lessee has an indefeasible right to make use of his property in a way to injure another in person or property. And he as well as the lessee can be made to respond in damages to any one who has suffered injury by and through his unlawful act. But in order that any one may recover damages of another, he must show that the damages were caused by the wrongful act. It is only on such a showing that any one can maintain a suit for damages. It is not a subject for police regulation to determine what is the cause of the damage. It is a judicial question of fact, to be determined in a judicial inquiry, free from any control on the part of the legislature. The legislature cannot determine when the legal relation of cause and effect exists between two facts. It will prob-

[1] Bertholf *v.* O'Reilly, 74 N. Y. 524 (30 Am. Rep. 323).

[2] For a discussion of limitation upon the power of the government to prohibit the sale of intoxicating liquors, see *ante*, § 125.

ably be granted that in one sense the relation of cause and effect exists between any two facts that may be selected. In organized society the lives of men are so intimately bound up with each other, there is so much influence and counter influence, that it is difficult to say whether anything now known would have happened, if some antecedent fact had not occurred, it matters not how remote. To apply the reasoning to the facts of the case in question, for the purpose of easier illustration, if the lessor had done his duty to the public in preventing an unlawful use of the premises, the injury to the third person would not have occurred through this intoxication, but likewise the injury would not have happened, if the lessee had not broken the law in making the prohibited use of the land. Nay, further, the joint wrongful acts of the lessor and lessee would not have caused the injury, if the purchaser had not been guilty of the vice, and, under the peculiar circumstances of the present case, the crime, of intoxication. Here are three unlawful acts, following each other in the order of sequence, followed by an injury to a third person. The common-law rule, which made the proximate cause responsible for the damage, to the exclusion of the remote cause, would have declared the intoxicated person to be alone responsible. Indeed, when one considers the fact that the same damage could have been caused as easily by an intoxication produced by liquor bought from some other dealer, within or without the State in which the sale of it is prohibited or regulated, and as easily, whether the lessor did or did not know of the sale of the liquor by his lessee; when it is still further considered that in the New York case there would have been no violation of law, had no injury been inflicted on another by the intoxicated person, the conclusion becomes irresistible that the damage was not caused by the wrongful act of the lessor or the lessee. The New York court holds that the legislature "may change the rule of the common law, which looks only to the proximate cause of the mischief,

in attaching legal responsibility and allow a recovery to be had against those whose acts contribute, although remotely, to produce it." If this rule of the common law was itself a police regulation, it would of course be subject to legislative change; but it has been established by the accumulated experience of ages as the best rule for the ascertainment of the cause of a damage, and is no more subject to legislative change than is the law of gravitation.[1] This subject, and the facts of this particular case,[2] has been given this extended consideration, because it was an extraordinary exercise of police power, and furnished a most striking example of the great uncertainty that now prevails in the legal minds of this country, concerning the constitutional limitations upon the police power of the government.

§ 158. **Search warrants — Sanitary inspection.** — The security of the privacy of one's dwelling, not only against private individuals, but also as against the officers of the law, or the frequent and unrestrained interference with this privacy by the common police officers, more than anything else distinguishes a free country, one governed by officials under constitutional limitations, from a country, in which political absolutism is checked only by the limitations of nature. The dwelling of the continental European, particularly the Frenchman, must open at the command of the police officer, whenever a crime has been committed, and suspicion rests upon him. His closets and other private apartments are broken open, his private papers ruthlessly scattered about or taken away, to be subjected to the inspection of some other official without any specific description of the person or things which are to be apprehended; and without any proof beyond a mere suspicion, that the

[1] See *ante*, § 60, for a further and more general discussion of this question of remote and proximate cause.

[2] Bertholf *v.* O'Reilly, *supra*.

house contains the persons or thing sought for. But under a constitutional government, of which the liberty of the citizen is the corner stone, the privacy of one's dwelling is rarely ever invaded, and then only in extreme cases of public necessity, and under such limitations as will serve to protect the citizen from any unusual disturbance of his home life. The common law maxim, "Every man's house is his castle" is guaranteed in this country by an express constitutional provision, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] Except in accordance with, and under the restrictions of this, constitutional provision, one may close his doors against all intruders, and resist their entrance by the use of all the force that may be necessary for the protection of the property, even to the extent of taking the life of the trespasser.[2] The constitutional guaranties of the security of one's dwelling enable the Englishman and American to feel that there is a reality in these beautiful words of Lord Chatham, which have been so often quoted: "The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may play through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

But the necessities of organized society do require that at times the doors of the private dwellings shall be opened for the admission of the officers of the law, and principally

[1] U. S. Const. Amend., art. 4. Similar provisions are to be found in each of the State constitutions.

[2] Bohannan *v.* Commonwealth, 8 Bush, 481 (8 Am. Rep. 474); Pond *v.* People, 8 Mich. 150.

as an aid to the prosecution of crimes. But, before that is permissible, a search warrant must be obtained from a court of competent jurisdiction, which is authorized by law to grant it; it must be issued to an officer of the law, and never to the complainant; it can only be granted upon a showing of probable cause for believing that a proper case has arisen for the exercise of this police power; and lastly, the warrant must contain a particular description of the premises to be searched, and the person or things to be taken into custody.[1] A failure to comply with any one of these requirements will render the warrant defective, and the entrance into the dwelling under it an unlawful invasion. In other countries search warrants are issued upon the barest suspicion that the house contains a criminal or things that are for some reason subject to seizure, and often, too, for the sole purpose of procuring evidence wherewith to convict the criminal. The only fact that is required to be established by *prima facie* evidence is that a crime has been committed by some one, known or unknown, it matters not which, and it is in the judgment of the police officer advisable that a particular house shall be searched in the interest of justice.

Under no circumstances can a search warrant be issued in this country for the sole purpose of securing the necessary evidence for the State. Whenever the police officer shows probable cause for believing that stolen goods are secreted in the house of the supposed thief or some other person, and in all other cases where the house contains the goods, the possession and use of which constituted the crime, that house may be searched, and so far, and in these cases, the State may, with the aid of a search warrant, procure evidence of the guilt of the accused. But ordinarily this is not permitted. A man's letters and papers and other effects can-

[1] Bishop Crim. Procedure, §§ 240-246, 716-719; 2 Hale P. C. 142, 150; Archbold Cr. Law, 145, 147.

not be searched in the aid of a criminal prosecution against him. Not only is this prohibited by the spirit of the constitutional provision in reference to the issue of search warrants, but likewise by another provision [1] which provides that no one "shall be compelled in any criminal case to be a witness against himself." [2] But, as already stated, where the crime or misdemeanor consists of the possession or use of things, which are prohibited by the law, either because of their injurious effect upon the public, or because the goods belong to another, or when there is an unlawful detention of persons, search warrants may be issued for their recovery, when satisfactory evidence of their being stored in a particular dwelling is presented to the judicial officer who issues the warrant. Thus search warrants have been granted to search for stolen goods, for counterfeit money, forged bills and notes, for goods held in violation of the revenue laws of the United States,[3] in violation of the laws against lotteries and gambling in general,[4] for obscene publications and intoxicating liquors kept in violation of the liquor laws,[5] and for the recovery of public books and records which have been taken from

[1] U. S. Const. Amend. art. 5. The same provision is found to be in most, if not all, of the State constitutions.

[2] "To enter a man's house by virtue of a warrant, in order to procure evidence, is worse than the Spanish Inquisition, — a law under which no Englishman would wish to live an hour." Lord Camden in Entinck *v.* Carrington, 19 State Trials, 1029; *s. c.* 2 Wils. 275; Hackle *v.* Money, 2 Wils. 205; Leach *v.* Money, 19 State Trials, 1001; *s. c.* 3 Burr. 1692; *s. c.* 1 W. Bl. 555; Wilkes *v.* Wood, 19 State Trials, 1153; Archbold Cr. Law, 141; Cooley Const. Lim. 371, 372.

[3] Sandford *v.* Nichols, 13 Mass. 286 (7 Am. Dec. 151); Sallee *v.* Smith, 11 Johns. 500. See Locke *v.* United States, 7 Cranch, 339; The Luminary, 8 Wheat. 401; Henderson's Distilled Spirits, 14 Wall. 44; Gindrat *v.* People, 138 Ill. 103; Glennon *v.* Britton, 155 Ill 232.

[4] Commonwealth *v.* Dana, 2 Met. 329; Day *v.* State, 7 Gill, 321; Lowery *v.* Rainwater, 70 Mo. 152 (35 Am. Rep. 420).

[5] State *v.* Brennan's Liquors, 25 Conn. 278; Hibbard *v.* People, 4 Mich. 125; Fisher *v.* McGirr, 1 Gray, 1; Gray *v.* Kimball, 42 Me. 299; Allen *v.* Colby, 47 N. H. 445.

the proper custody. Search warrants have also been issued for the purpose of securing the release of females supposed to be forcibly concealed in houses of ill-fame; for the recovery of minor children, who have been enticed or forcibly taken away from their parents or guardian, and probably in any case of probably unlawful detention of a human being.[1] Search warrants may also be granted in aid of those sanitary and other police regulations, which are designed to prevent the storage of gunpowder or other explosive or inflammable materials in such large quantities that it will endanger the public safety, or to check or regulate the accumulation of offal or garbage to the injury of the public health. It would also be a reasonable regulation to compel the search of the house or premises for the discovery of persons suffering from some dangerously infective disease, and whom the law required to be cared for in the public lazaretto; or to see that, after the recovery of such a person from an infectious disease, the house is properly disinfected. In consideration of the reasonableness of these sanitary regulations, it is supposed that in the enforcement of them, one's house may be searched in opposition to his wishes and by force, without a search warrant.[2] But it is probable that in a clear case of the resistance of the entrance of the health officer, a search warrant would be required. These regulations are however so reasonable that it is rarely, if ever, necessary for the officer to do more than to show his general authority.

The search warrant cannot be issued in aid of civil process, but one may be ejected from his dwelling in pursuance of a decree of ejectment without a formal search warrant.[3] As a general proposition an officer may

[1] Cooley Const. Lim. 372.

[2] Cooley's Principles of Const. Law, p. 211.

[3] "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their

go to serve a process wherever the subject-matter of the process may be. But, except for the purpose of making an arrest or seizure in criminal cases, and in the few cases in which search warrants are issued in the enforcement of sanitary and other police regulations, the service of process is subject to this limitation, that the officer cannot break open the outer door. But if the outer door is found open, the officer may break open any inner door, if that be necessarry for the service of the process.[1]

Another important requisite is that the warrant must specify and describe particularly the place to be searched, and the person or thing sought after. The description of the house must be sufficiently particular, in order that it may be distinguished from others. A description that is equally applicable to two or more buildings is defective, and an erroneous or defective description will vitiate the warrant, and make the entrance under it an unlawful trespass.[2] If a warrant is issued to search a dwelling-house, the adjoining barn cannot under this warrant be forcibly entered.[3] The same regulations apply to the persons or

use was confined to the case of public prosecutions instituted and pursued for the suppression of crime, and the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity; because without them felons and other malefactors would escape detection." Merrick, J., in Robinson *v.* Richardson, 13 Gray, 456.

[1] Semayne's Case, 5 Co. 91; Smith Lead. Cas. 213; Ilsley *v.* Nichols, 12 Pick. 270; Swain *v.* Mizner, 8 Gray, 182; Oystead *v.* Shed, 13 Mass. 520; People *v.* Hubbard, 24 Wend. 369; Snydecker *v.* Brosse, 51 Ill. 357; Bailey *v.* Wright, 38 Mich. 96.

[2] Sandford *v.* Nichols, 13 Mass. 286 (7 Am. Dec. 151); Allen *v.* Staples, 6 Gray, 491; McGlinchy *v.* Harrows, 41 Me. 74; Humes *v.* Tabor, 1 R. I. 464; Ashley *v.* Peterson, 25 Wis. 621; Bell *v.* Rice, 2 J. J. Marsh. 44 (9 Am. Dec. 122).

[3] Jones *v.* Fletcher, 41 Me. 254; Dowling *v.* Porter, 8 Gray, 539; Bishop Cr. Procedure, §§ 716, 719. And when a building is to be searched, it is usually necessary to give the name of the owner or occupant. Stone *v.* Dana, 5 Met. 98.

things to be taken into custody. They must be particularly described, in order that the warrant may be free from objection. The warrant for the arrest of a person under a fictitious name, without any further description, whereby he may be identified, would be defective,[1] and so likewise if the things to be seized are described generally as "goods, wares and merchandise."[2] It is considered highly objectionable, on principle, for the warrant to be used in the night time; and while there is no constitutional provision which prohibits a search under a warrant in the night, statutes invariably provide that the search shall be made in the day, except in a few urgent cases of felony.[3]

It is also necessary for the warrant to direct that the person or things seized shall, if found, be taken to the magistrate, who issued the warrant, in order that there may be a judicial examination of the facts, and a disposition of the person or things according to law. A search warrant is fatally defective, which does not provide for this subsequent judicial examination, but leaves the disposition of the person or things to the judgment of the ministerial officer.[4]

When the warrant complies with all the requirements of the law, the officer is protected from liability in damages for whatever force he may find it necessary to use in the execution of the warrant, even though the persons or things sought after should not be found.[5] But he must keep strictly within the limits of his warrant, and should he

[1] Commonwealth *v.* Crotty, 10 Allen, 403.

[2] Sandford *v.* Nichols, 13 Mass. 286 (7 Am. Dec. 151).

[3] 2 Hale P. C. 150; Cooley Const. Lim. 370.

[4] 2 Hale P. C. 150; Fisher *v.* McGirr, 1 Gray, 1; Greene *v.* Briggs, 1 Curt. 311; State *v.* Snow, 3 R. I. 64; Bell *v.* Clapp, 10 Johns. 263 (6 Am. Dec. 339); Hibbard *v.* People, 4 Mich. 126; Matter of Morton, 10 Mich. 208; Sullivan *v.* Oneida, 61 Ill. 242; Lowry *v.* Rainwater, 70 Mo. 152 (35 Am. Rep. 420); Hey Sing Jeck *v.* Anderson, 57 Cal. 251.

[5] 2 Hale P. C. 151; Barnard *v.* Bartlett, 10 Cush. 501; Cooley Const. Lim. 374.

enter dwellings, arrest persons, or seize things, not falling within the description contained in the warrant, he is liable in damages for the unwarranted trespass.[1]

§ 159. **Quartering soldiers in private dwellings.** — It is provided by the United States constitution,[2] and by almost every State constitution, that "no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." At the present time, and in this country, the necessity for this constitutional provision does not seem to be very urgent, and it is not. But at the time when the provision was incorporated into the constitution, the practice was so common in some countries, and the danger of its being generally adopted in our own country [it had in colonial days been occasionally resorted to] appeared to be sufficiently imminent in order to justify its enactment. It is well that there should be an unequivocal declaration on so important a matter; for no more efficient means of oppression of a people can be devised than the power, at all times and without any limitation, to throw upon an objectionable person the burden of housing and supporting a company of soldiers. The constitutional provision, just cited, protects the house of the citizen against all such intrusions in time of peace, and in war the matter is required to be specially regulated by law. It is safe to say, however, that, with the present temper of public opinion, the exercise of this power would not be tolerated now, even in time of war, unless provision is made for the full compensation of those on whom this burden should be made to fall.[3]

[1] Crozier *v.* Cudney, 6 B. & C. 232; 9 D. & R. 224; State *v.* Brennan's Liquors, 25 Conn. 278.

[2] U. S. Const. Amend., art. 3.

[3] See *post*, § 166, in reference to forcible appropriation of private property in time of war.

§ 160. **Taxation — Kinds of taxes.** — The functions of a government can only be exercised and kept in operation with the aid of material means furnished by the people; and no government could be properly called stable, which had to depend upon voluntary contributions. The exaction of these means, therefore, is a power which a government inherently and necessarily possesses without any express grant. A tax, is, in its most comprehensive sense, any charge or assessment levied by the government for public purposes upon the persons, property, and privileges of the people within the taxing district or State. It is a forced contribution of means toward the support of the government.

Taxes may assume very many forms, varying according to the thing, privilege, or right which is taxed. They may take the form of duties, imposts and excises, and the taxes imposed by the general government are confined to these. The power to impose these indirect taxes is expressly granted to the United States government. The constitution provides[1] that "the Congress shall have power to levy and collect taxes, duties, imposts, and excises to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." Duties and imposts are the taxes levied upon importations into this country, and under this express power it is claimed that the general government may establish a protective tariff, which has already been shown to be in violation of constitutional liberty.[2] Excises are the taxes laid upon the manufacture and sale of articles of merchandise, upon licenses to follow certain occupations, and upon the enjoyment of franchises or privileges. The internal revenue tax upon the manufacture and sale of intoxicating liquors and tobacco are at present the only excises levied by the general gov-

[1] Const. U. S., art. I., § 8, ch. 1.

[2] See *ante*, § 93.

ernment.[1] But there is no limitation upon the power of the government in selecting the subjects of taxation; and during the late civil war, and immediately thereafter, there were taxes, in the form of stamp duties on matches, bank checks, legal papers and the like. The United States government is also authorized by the constitution to impose direct taxes, which has been held to include any capitation and land taxes,[2] subject to the limitation that they must be apportioned among the several States according to the representative population.[3]

A very common form of State and municipal taxation is the exaction of license fees for the privilege of pursuing any occupation or profession, a tax, therefore, upon occupations. The constitutional character of the license tax, and its points of distinction from the license fee exacted in connection with the police regulation of an occupation, the pursuit of which is likely to prove dangerous or injurious to society, have already been fully explained in another place,[4] and need not be discussed in this connection. The States have also at times imposed a poll-tax upon the citizen, and made the payment of it a condition precedent to the exercise of the right of suffrage. But this mode of taxation incurs great popular disfavor, and is very rarely, if at all, employed now.

The most common form of State and municipal taxation is the taxation of property, both real and personal, and there is a fundamental difference between the character of taxation generally, including the taxation of personal

[1] Since the above was written at the last session of Congress, 1885–1886, a law was passed imposing a tax upon the sale and manufacture of oleomargarine; and in 1898, Congress passed a general stamp act, and imposed a graduated tax upon inheritances.

[2] Hylton *v.* United States, 3 Dall. 171; Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Veazie Bank *v.* Fenno, 8 Wall. 533; Springer *v.* United States, 102 U. S. 586.

[3] Const. U. S. art. I., § 2, art. I., § 9.

[4] See *ante*, § 119.

property, and the character of taxation of real property. Taxation, generally, is imposed upon citizens and resident aliens, resting upon the permanent or temporary allegiance they owe to the goverment; and they are supposed to receive a fair equivalent for these involuntary contributions in the domestic peace and order, and the protection to their rights of person and property, which a stable government insures. The obligation to pay taxes in such cases rests upon the fact of domicile and citizenship. But the taxation of real property rests upon other grounds. In its application to real property, taxation assumes a decidedly feudal character. If the power to tax real property rested solely upon the obligations of citizenship or domicile, as most of the legal authorities seem to hold,[1] then it could only be levied upon those proprietors of lands who were citizens. At the time when the earlier cases, which have been cited, were decided, no one but a citizen could become the proprietor of lands in the United States, and this coincidence no doubt caused the learned judges to make the statements, upon which the claim of a connection between citizenship and taxation of real property rests. But, since then, the restriction upon the proprietorship of lands by aliens has been removed in most of the States, and now all land situated within the jurisdiction of the government which levies the tax are taxed for their proportionate share, whether the land is owned by citizens or aliens, residents or non-residents. The levying of a tax upon land, and the enforcement of the levy, are proceedings *in rem* against the land, and not *in personam* against the proprietors.[2]

[1] Cooley on Tax. 360. In some of the States, however, a distinction it made by statute between the resident and non-resident lands as they are called, imposing a personal liability upon the owners of the resident lands. Cooley on Tax. 278, 279.

[2] Providence Bank *v.* Billings, 4 Pet. 561; McCulloch *v.* Maryland, 4 Wheat. 428; Opinions of Judges, 48 Me. 591; People *v.* Mayor, etc., 4 N. Y. 422; Clark *v.* Rochester, 24 Barb. 482; Phila. Assn., etc. *v.* Wood,

Taxation of real property is nothing more than the *reditus* which the tenant of a feud paid to the lord of the manor for the enjoyment of the land; in this country, in the case tenancies in fee, the State taking the place of the intermediate landlord, as in England the king did in the case of tenancies *in capite*. Indeed the obligation of citizenship is a modern outgrowth of the allegiance of the feudal system, which the vassal or tenant of land owed through his lord to the king, as the lord paramount or ultimate proprietor of the lands of the kingdom. The obligation of citizenship, apart from the obligations of a tenant of lands, was unknown to the feudal age.[1] But whatever may be the proper theory in respect to the character and the authority of taxation, the power of the government to levy the proportionate share of taxes upon the lands owned by aliens has never been questioned, and an exemption of such lands from the operation of the levy would most surely meet with popular demonstrations of disapproval.

§ 161. **Limitations upon legislative authority.** — The power of a government to impose taxes is almost without limitation and necessarily so, because of the varied character of governmental functions and needs. Chief Justice Marshall has almost denied the existence of any limitations upon the power of taxation. He said, in one case, "the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable or the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents.

39 Pa. St. 73; Moale *v.* Baltimore, 5 Md. 314; Doe *v.* Deavors, 11 Ga. 79; Chicago *v.* Larned, 34 Ill. 279; Davison *v.* Ramsay Co., 18 Minn. 481.

[1] Tiedeman on Real Prop., § 20; 1 Washb. on Real Prop. 46, citing 3 Guiz. Hist. Civ. 108.

This is, in general, a sufficient security against erroneous and offensive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." It is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power."[1]

It is undoubtedly true that the power of the legislature to determine the rate of taxation is limited only by its wise discretion, and may be extended so as to involve a complete confiscation of all the taxable property within the State, if the payment of such a tax could be enforced. There would be no redress in the courts for such an abuse of the power. It is also true that the selection of the objects of taxation is without limitation, except those imposed by the United States constitution and arising out of the inter-relation of the Federal and State governments.[2]

The State may freely determine upon what occupations and manufactures to impose a license or excise tax, and may exempt others from the burden of taxation with or without laudable reasons; it may determine what is taxable property, and exempt from the levy any kind of property in

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 428, 430. See, also, Providence Bk. *v.* Billings, 4 Pet. 514; Kirtland *v.* Hotchkiss, 100 U. S. 491; Portland Bk. *v.* Apthrop, 12 Mass. 252; Herrick *v.* Randolph, 13 Vt. 525; Armington *v.* Barnet, 15 Vt. 745; Thomas *v.* Leland, 24 Wend. 65; People *v.* Mayor, etc., of Brooklyn, 4 N. Y. 491; Kirby *v.* Shaw, 19 Pa. St. 258; Sharpless *v.* Mayor, etc., 21 Pa. St. 145; Weister *v.* Hade, 52 Pa. St. 474; Wingate *v.* Sluder, 6 Jones (N. C.), 552; West. Un. Tel. Co. *v.* Mayor, 28 Ohio St. 521; Board of Education *v.* Mclandsborough, 36 Ohio St. 227.

[2] As to which, see *post*, § 231.

the exercise of its discretion. The arbitrary character of the exemptions in any of these cases furnishes no ground for an appeal to the courts.[1] But, usually, as a matter of course, there is a public reason, upon which the exemption may be justified. For the promotion of the public welfare, educational and religious institutions and their property are often exempted from taxation, and the right to make the exemption has been rarely questioned.[2] For the purpose of lightening the burden of the poorer classes, and relieving the State of the danger of consequent pauperism, the State may very properly exempt from taxation the tools and other means of support of the wage-earner. But it has been held to be unconstitutional to make exemptions from taxation on account of sex or age, as for example, widows, maids and female minors. Such an act was declared to be void.[3] Classes or kinds of property may be exempted, as well as classes of persons.[4] But the legislature of the State must determine for itself what shall be objects of taxation. The county or municipal authorities cannot be permitted or authorized by the legislatures to make the exemptions.[5] Statutory exemptions are always very strictly construed against the individual and in favor of the public;[6] and ordinarily a general exemption by

[1] Brewer Brick Co. *v.* Brewer, 62 Me. 62 (16 Am. Rep. 395; Durach's Appeal, 62 Pa. St. 491; Stratton *v.* Collins, 43 N. J. 563; New Orleans *v.* Fourchy, 30 La. Ann. pt. 1, 910; New Orleans *v.* People's Bank, 32 La. Ann. 82; State *v.* North, 27 Mo. 464; People *v.* Colman, 3 Cal. 46.

[2] It is no violation of the constitutional principle of religious liberty to exempt the property of religious institutions from taxation. Trustees of Griswold College *v.* State, 46 Iowa, 275 (26 Am. Rep. 138.)

[3] State *v.* Indianapolis, 69 Ind. 375 (35 Am. Rep. 223.)

[4] Butler's Appeal, 73 Pa. St. 48; Sioux City *v.* School District, 55 Iowa, 150.

[5] Farnsworth Co. *v.* Lisbon, 62 Me. 451; Wilson *v.* Mayor, etc., of New York, 4 E. D. Smith, 675; State *v.* Parker, 33 N. J. 213; State *v.* Hudson, etc., Commissioners, 37 N. J. 11; Hill *v.* Higdon, 5 Ohio St. 243; State *v.* County Court, 19 Ark. 360; Weeks *v.* Milwaukee, 10 Wis. 242; Wilson *v.* Supervisors of Sutter, 47 Cal. 91.

[6] Railway Co. *v.* Philadelphia, 101 U. S. 528; State *v.* Mills, 34 N. J.

the State from taxation does not extend to assessments by the municipal authorities for a local improvement.[1]

In many of the State constitutions, exemptions from taxation are prohibited, except so far as they are expressly authorized by the provisions of the constitution. And the permitted exemptions are usually confined to religious and eleemosynary institutions.

In reference to these matters, as just explained, the power of taxation is practically without limitation, at any rate subject to very few limitations. But it would not do to say that every legislative act, which assumes the exercise of the power of taxation, will be constitutional. Levies can be made upon the property of the individual which will transcend the object of taxation, as well as violate its spirit. The levy of a tax is only permissible, except under a tyrannical government, when it is made for a public purpose, and it is proportioned uniformly among the objects or subjects of taxation. When a tax is imposed for some private or individual benefit, or is not uniformly imposed upon those who ought to bear it, it is perfectly proper; nay, it is the duty of the courts, to interfere and prohibit what may be justly called an extortion.[2] But the term "public purpose"

177; Trustees of M. E. Church *v.* Ellis, 38 Ind. 3; Nashville, etc., R. R. Co. *v.* Hodges, 7 Lea, 663.

[1] Seamen's Friend Society *v.* Boston, 116 Mass. 181; Universalist Society *v.* Providence, 6 R. I. 235; Brewster *v.* Hough, 10 N. H. 138; Seymour *v.* Hartford, 21 Conn. 581; Matter of Mayor, etc., 11 Johns. 77: Patterson *v.* Society, etc., 24 N. J. 385; Pray *v.* Northern Liberties, 31 Pa. St. 69; Baltimore *v.* Cemetery Co., 7 Md. 517; Orange, etc., R. R. Co. *v.* Alexandria, 17 Gratt. 185; Lafayette *v.* Orphan Asylum, 4 La. Ann. 1; Broadway Baptist Church *v.* McAtee, 8 Bush, 508 (8 Am. Rep. 480); Cincinnati College *v.* State, 19 Ohio, 110; Palmer *v.* Stumph, 29 Ind. 329; Peoria *v.* Kidder, 26 Ill. 351; Lockwood *v.* St. Louis, 24 Mo. 20; Le Fever *v.* Detroit, 2 Mich. 586; Hale *v.* Kenosha, 29 Wis. 599.

[2] "It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a pur-

must not be used in this connection in any narrow sense. Taxes are levied for a public purpose, not only when they are designed to pay the salaries of government officials, to erect and keep in repair government buildings; to maintain the public roads, harbors and rivers in a fit condition, and to provide for the defenses of the country. Taxes may not only be levied for such purposes, but also for all purposes of public charity. It is a public purpose to erect with State funds, obtained from taxes, penitentiaries, orphan and lunatic asylums, hospitals and lazarettos, public schools and colleges.[1] It is a public purpose to provide pensions for the soldier and other employees of the government, when they have become disabled in service or superannuated.[2] And whenever there is a reasonable doubt as to the character of the purpose for which the tax was levied, the doubt should be solved in favor of the power of the legislature to lay the tax.[3] But if the purpose be truly private; if the tax in effect takes the property of one man and gives it to another, it is illegal and it is the duty of the courts to enjoin

pose and in a manner not authorized by the constitution and laws." Bigelow, Ch. J., in Freeland *v.* Hastings, 10 Allen, 570, 575. See, also, to the same effect, Hooper *v.* Emery, 14 Me. 375; Allen *v.* Jay, 60 Me. 124 (11 Am. Rep. 185); Talbot *v.* Hudson, 16 Gray, 417; Weismer *v.* Douglass, 64 N. Y. 91 (21 Am. Rep. 588); Tyson *v.* School Directors, 51 Pa. St. 9; Washington Avenue, 69 Pa. St. 352 (8 Am. Rep. 255); People *v.* Townsend Board of Salem, 20 Mich. 452; People *v.* Supervisors of Saginaw, 26 Mich. 22; Ferguson *v.* Landram, 5 Bush, 230; Morford *v.* Unger, 8 Iowa, 82; Hansen *v.* Vernon, 27 Iowa, 28.

[1] But it is only for the support of public charities that the government may tax the people. A levy of a tax for donation to some private benevolent or charitable institution is void. St. Mary's Industrial School *v.* Brown, 45 Md. 310.

[2] Booth *v.* Woodbury, 32 Conn. 118; Speer *v.* School Directors of Blairville, 50 Pa. St. 150.

[3] "To justify the court in arresting the proceedings and declaring the tax void, the absence of all public interest in the purposes for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at the first blush." Per Dixon, Ch. J., in Brodhead *v.* City of Milwaukee, 19 Wis. 624, 652. See Spring *v.* Russell, 7 Me. 273; Mills *v.* Charleton, 29 Wis. 411 (8 Am. Rep. 578).

its collection.[1] For example, it has been held unlawful to levy taxes in aid of manufacturing and other private industrial enterprises,[2] for the relief of farmers, whose crops have been destroyed, to supply them with seeds and provisions,[3] or for making loans to persons whose homes have been destroyed by fire.[4] It has also been held illegal to pay a subscription to a private corporation that is to be devoted to a private purpose.[5] On the other hand, it has been repeatedly held that the legislature may authorize counties and municipal corporations to subscribe for capital stock in railroad companies in aid of their construction and may levy a tax in order to pay the subscription.[6]

[1] "The legislature has no constitutional right to * * * lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them." Black, Ch. J., in Sharpless *v.* Mayor, etc., 21 Pa. St. 147, 168.

[2] Loan Association *v.* Topeka, 20 Wall. 655; Opinions of Judges, 58 Me. 590; Allen *v.* Jay, 60 Me. 124 (11 Am. Rep. 185); Commercial Bank *v.* Iola, 2 Dill. 353.

[3] State *v.* Osawkee, 14 Kan. 418. But the United States, as well as the State governments, have frequently come with the public funds to the rescue of the people of sections which have been inundated by floods, or devastated by disease or fire; and it would seem that the State aid under such circumstances differed little if at all from the ordinary bestowal of alms upon the poor, and is equally justifiable, as being a public charity.

[4] Lowell *v.* Boston, 111 Mass. 454 (15 Am. Rep. 39).

[5] Weismer *v.* Douglass, 64 N. Y. 91 (21 Am. Rep. 586).

[6] Zabriskkie *v.* Cleveland, C. & R. R. Co., 23 How. 381; Bissell *v.* ity of Jeffersonville, 54 How. 287; Amey *v.* Allegheny City, 24 How. 364; Curtis *v.* Butler Co., 24 How. 435; Mercer Co. *v.* Hacket, 1 Wall. 83; Gulpcke *v.* City of Dubuque, 1 Wall. 175; Seybert *v.* City of Pittsburg, 1

Since the legislature is prohibited from making levies for private purposes, it cannot authorize municipal corporations to do so.[1]

But great difficulty is experienced in enforcing an observance of this limitation, if any desire is manifested to violate it, since the legislature usually makes one levy of tax in a gross sum to cover all the probable expenditures of the government during the fiscal year, and there is rarely, if ever, a special levy for each item of expenditure. It would certainly hamper very seriously the operations of government, if each taxpayer were allowed to question the legality of the levy, because one of the proposed items of expenditure is not for a public purpose. In such a case, the interest of the individual must yield to the public good, and apart from a change of representatives at the next election, there is probably no remedy, unless the treasurer or other disbursing officer should refuse to apply the public funds to the unlawlul purpose. But if a special stamp or license tax should be levied for a private purpose, the taxpayer can resist the payment, and demand from the ordinary courts protection against the action of the tax collector.

A tax levy may also be open to objection because it does not comply with the constitutional requirement of uniform apportionment. Until very recently it has been supposed

Wall. 272; Van Hortrup *v.* Madison City, 1 Wall. 291; Meyer *v.* City of Muscatine, 1 Wall. 384; Havemeyer *v.* Iowa Co., 3 Wall. 294; Thomson *v.* Lee Co., 3 Wall. 327; Rogers *v.* Burlington, 3 Wall. 654; Mitchell *v.* Burlington, 4 Wall. 270; Campbell *v.* City of Kenosha, 5 Wall. 194; Riggs *v.* Johnson, 6 Wall. 166; Lee Co. *v.* Rogers, 7 Wall. 181; City of Kenosha *v.* Lamson, 9 Wall. 477; Chicago, B. & Q. R. R. Co. *v.* County of Otoe, 16 Wall. 667; Gilman *v.* Sheboygan, 2 Black, 510; Tipton Co. *v.* Rogers, L. & M. Works, 103 U. S. 523. The cases from the State courts are too numerous to cite in detail. But see, to the same effect, Supervisors of Portage Co. *v.* Wis. Cent. R. R. Co., 121 Mass. 460; Augusta Bank *v.* Augusta, 49 Me. 507; Williams *v.* Duanesburg, 66 N. Y. 129; Brown *v.* County Comrs., 21 Pa. St. 37; St. Louis *v.* Alexander, 23 Mo. 483; Smith *v.* Clark Co., 54 Mo. 58.

[1] Attorney-General *v.* Eau Claire, 37 Wis. 400.

that Congress was subjected to this limitation of the power of taxation, in the same sense in which it is imposed upon the State legislatures and municipal councils by the State constitutions. But, recently, the United States Supreme Court, in sustaining the constitutionality of the national tax upon inheritances, declared that the national constitution imposed upon Congress, in the exercise of power of taxation, the duty of observing geographical uniformity, and not uniformity and equality as to individuals.[1] The language of the State constitutions in this connection is not invariably the same, and in some of them the language is sufficiently variant to account for the contradiction of authorities; but as a general proposition, they are considered to make about the same requirement. Taxation must be equal and uniform, but the constitutions do not require that the same rule of uniformity should be employed in the apportionment of all taxes. No one rule of uniformity can be devised, which will be applicable to all kinds of taxation, and consequently for each mode of taxation there must be a special rule of apportionment. Thus, for example, the taxation of property is apportioned according to the value, it being considered that such an apportionment will bring about a more perfect equalization of the tax than any other rule. But in laying a tax upon professions and occupations, a different rule of uniformity must be followed.[2] And the usual rule is to establish a scale of taxation upon the occupations, graded in proportion to their relative profits. The meaning, therefore, of this constitutional limitation is that whatever the rule of apportionment is, it must be uniformly and impartially applied to all objects of the special taxation.[3] There

[1] See *ante*, § 137a, pp. 658–661.

[2] As to the uniformity of the tax on occupations, see *ante*, § 119.

[3] See State Railroad Tax Cases, 92 U. S. 575; Cummings *v.* National Bank, 101 U. S. 153; Oliver *v.* Washington Mills, 11 Allen, 268; Tidewater Co. *v.* Costar, 18 N. J. Eq. 518; Kittanning Coal Co. *v.* Common-

cannot be any partial discrimination between persons or property living in the same taxing district, and falling within the established rule of apportionment. The State has the right to determine the limits of the taxing district,[1] but when the taxing district is established, and the rule of apportionment determined upon, the tax must be uniformly apportioned throughout the taxing district. There cannot be different rules of apportionment for different persons or different sections of the district.[2]

The charge of illegality, because of the violation of the constitutional requirement of equality and uniformity in the apportionment, is most commonly brought against local assessments so-called. It is very common at the present

wealth, 78 Pa. St. 100; Galtin *v.* Tarborough, 78 N. C. 119; Youngblood *v.* Sexton, 32 Mich. 406; Bureau Co. *v.* Railroad Co., 44 Ill. 229; Marsh *v.* Supervisors, 42 Wis. 502; Philles *v.* Hiles, 42 Wis. 527; Ex parte Robinson, 12 Nev. 263; Sanborn *v.* Rice, 9 Minn. 273; New Orleans *v.* Dubarry, 33 La. Ann. 481 (29 Am. Rep. 273); State *v.* Rolle, 30 La. Ann. 991; Walters *v.* Duke, 31 La. Ann. 668; State *v.* Cassidy, 22 Minn. 312 (21 Am. Rep. 765). But see, *contra*, Sims *v.* Jackson, 22 La. Ann. 440; State *v.* Endom, 23 La. Ann. 663; State *v.* So. Ca. R. R. Co., 4 S. C. 376.

[1] But the tax district must be of uniform character, so that the tax shall fall upon those who are almost equally benefited by the expenditure. It has thus been held unlawful for a legislature to extend the limits of a city so as to include farming lands, and thus increase the revenue of the city. City of Covington *v.* Southgate, 15 B. Mon. 491; Arbegust *v.* Louisville, 2 Bush, 271; Swift *v.* Newport, 7 Bush, 37; Morford *v.* Unger, 8 Iowa, 82; Langworthy *v.* Dubuque, 13 Iowa, 86; Fulton *v.* Davenport, 17 Iowa, 404; Buell *v.* Ball, 20 Iowa, 282; Bradshaw *v.* Omaha, 1 Neb. 16; Durant *v.* Kauffman, 34 Iowa, 194. But see, *contra*, Stilts *v.* Indianapolis, 55 Ind. 515; Gaboney *v.* Cape Girardeau, 58 Mo. 141; Martin *v.* Dix, 52 Miss. 53 (24 Am. Rep. 661); New Orleans *v.* Cazelear, 27 La. Ann. 156. See, also, Kelly *v.* Pittsburg, 85 Pa. St. 170; Hewitt's Appeal, 88 Pa. St. 55; Weeks *v.* Milwaukee, 10 Wis. 242.

[2] Pine Grove *v.* Talcott, 19 Wall. 666, 675; Knowlton *v.* Supervisors of Rock Co., 9 Wis. 510; Exchange Bank *v.* Hines, 3 Ohio St. 1, 15; Kent *v.* Kentland, 62 Ind. 291 (30 Am. Rep. 182); State *v.* New Orleans, 15 La. Ann. 354; Chicago, etc., R. R. Co. *v.* Boone Co., 44 Ill. 240; Fletcher *v.* Oliver, 25 Ark. 289; Commissioners of Ottawa Co. *v.* Nelson, 19 Kans. 234 (27 Am. Rep. 101); East Portland *v.* Multnomah Co., 6 Ore. 62. But see, *contra*, Gillette *v.* Hartford, 31 Conn. 351; Serrill *v.* Philadelphia, 38 Pa. St. 355; Benoist *v.* St. Louis, 19 Mo. 179.

day for municipal corporations, instead of providing for the improvement of the streets, the construction of sewers and drains, and other local arrangements for the promotion of health and comfort, by the imposition of a general tax, collectible from all the taxpayers of the city according to the value of their taxable property, to apportion the cost of the improvement among those contiguous proprietors who are more directly benefited by the improvement. There are two modes of apportionment of the cost of these local improvements, both of which have been sustained as being a substantial compliance with the constitutional requirement of uniformity. One method is a more or less arbitrary apportionment of the cost according to the legislative judgment of the benefit received by each proprietor from the improvement,[1] while it has in the other cases been held to be equally lawful to make a taxing district of one street of a city, and apportion the cost of improvements among abutting proprietors in proportion to the frontage of their lots.[2] The reasoning of the courts is invariably that in local assessments, as in the case of a general tax, there is a more or less successful attempt at uniformity, although the rules of apportionment may be different. "A property tax for the general purposes of the government, either of

[1] People *v.* Mayor, etc., of Brooklyn, 4 N. Y. 419; Livingston *v.* New York, 8 Wend. 85 (22 Am. Dec. 622); Wright *v.* Boston, 9 Cush. 233; Jones *v.* Boston, 104 Mass. 461; Nichols *v.* Bridgeport, 23 Conn. 189; Cone *v.* Hartford, 28 Conn. 363; State *v.* Fuller, 34 N. J. 227; McMasters *v.* Commonwealth, 3 Watts, 292; Weber *v.* Rheinhard, 73 Pa. St. 370 (13 Am. Rep. 747); Alexander *v.* Baltimore, 5 Gill. 383; Howard *v.* The Church, 18 Md. 451; Scoville *v.* Cleveland, 1 Ohio St. 126; Sessions *v.* Crunkleton, 20 Ohio St. 349; Maloy *v.* Marietta, 11 Ohio St. 636; Bradley *v.* McAtee, 7 Bush, 667 (3 Am. Rep. 309); Hoyt *v.* East Saginaw, 19 Mich. 39; Sheley *v.* Detroit, 45 Mich. 431; Cook *v.* Slocum, 27 Minn. 500; La-Fayette *v.* Fowler, 34 Ind. 140; Peoria *v.* Kidder, 26 Ill. 351; Garrett *v.* St. Louis, 25 Mo. 505; Uhrig *v.* St. Louis, 44 Mo. 458; Burnett *v.* Sacramento, 12 Cal. 76. See, *contra*, State *v.* Charleston, 12 Rich. 702.

[2] Williams *v.* Detroit, 2 Mich. 560; Northern R. R. Co. *v.* Connelly, 10 Ohio St. 159; Lamsden *v.* Cross, 10 Wis. 282. *Contra*, McBean *v.* Chandler, 9 Heisk. 349; Perry *v.* Little Rock, 32 Ark. 31.

the State at large, or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit, more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation in the protection and improvement of his property than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted, instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty.[1] At least

[1] People *v.* Mayor, etc., of Brooklyn, 4 N. Y. 419, 427. In Ohio, the legislature has expressly authorized the municipal governments to apportion local assessments, either according to the frontage of lots or their assessed value. In declaring this law to be constitutional, Peck, J., says: "It is said that asseessments as distinguished from general taxation, rest solely upon the idea of *equivalents;* a compensation proportioned to the special benefits derived from improvement and that in the case at bar, the railroad company is not, and in the nature of things cannot be in any degree benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be *uniform*, affecting all the owners and all the property abutting on the street alike. One rule cannot be applied to one owner, and a different rule to another owner. One could not be assessed ten per cent, another five, another three, and another left altogether unassessed, because he was not in fact benefited. It is manifest that the actual benefits resulting from the improvement may be as various almost as the number of the owners and the uses to which the property may be applied. No general rule, therefore, could be laid down which would do equal and exact justice to all. The legislature have not attempted so vain a thing, but have prescribed two different modes in which the assessment may be made, and left the city authorities free to adopt either. The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate. Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159. See, generally, Willard *v.* Presbury, 14 Wall. 676; Allen *v.* Drew, 44 Vt. 174; Washington Avenue, 69 Pa. St.

this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of this matter, being within the scope of its lawful power, is conclusive."

352 (8 Am. Rep. 255); Craig *v.* Philadelphia, 89 Pa. St. 265; Philadelphia *v.* Rule, 93 Pa. St. 15; Hill *v.* Higdon, 5 Ohio St. 243; Ernst *v.* Kunkle, 5 Ohio St. 520; White *v.* People, 94 Ill. 604; Palmer *v.* Stumph, 29 Ind. 329; St. Joseph *v.* O'Donaghue, 31 Mo. 345; Hines *v.* Leavenworth, 8 Kan. 186; Burnett *v.* Sacramento, 12 Cal. 76; Chambers *v.* Satterlee, 40 Cal. 497. See for an exhaustive treatment of this subject, Cooley Const. Lim. 616, 634; 2 Dill. Mun. Corp., §§ 752, 761, and Tiedeman on Municipal Corporations, §§ 259, 259*a*.

NOTE. — The subject of taxation is so extensive that it is itself sufficient to constitute the subject of a separate volume, and an exhaustive treatment of it in the present connection would have swelled the volume beyond reasonable proportions. Moreover, the power of taxation is not commonly considered a branch of the police power. While I am convinced that it is scientifically correct to consider taxation as the imposition of a burden in the exercise of the police power of the government, the fact that the subject has been fully and thoroughly treated by distinguished writers (see Cooley Const. Lim. 592, 646; 2 Dillon Mun. Corp., §§ 735, 822; Sedgwick on Statutory and Constitutional Law, ch. 10), has led me in explaining the power of taxation as a branch of police power, to content myself with stating the constitutional objections that might be made to different forms of taxation, supporting the statements by a liberal citation of authorities.

CHAPTER XI.

STATE REGULATION OF PERSONAL PROPERTY.

SECTION 162. Laws regulating the creation and acquisition of interests in personal property — Real and personal property herein distinguished.
163. Statute of uses and rule against perpetuity, as regulations of personal property.
164. Regulation and prohibition of the sale of personal property.
165. Laws regulating disposition of personal property by will.
166. Involuntary alienation.
167. Control of property by guardian.
168. Destruction of personal property on account of illegal use.
169. Destruction of personal property in the interest of public health.
170. Laws regulating use of personal property.
171. Prohibition of possession of certain property.
172. Regulation and prohibition of the manufacture of certain property.
173. Carrying of concealed weapons prohibited.
174. Miscellaneous regulations of the use of personal property.
175. Laws regulating the use and keeping of domestic animals.
176. Keeping of dogs.
177. Laws for the prevention of cruelty to animals.
178. Regulation of contracts and other rights of action.
179. Regulation of ships and shipping.

§ 162. Laws regulating the creation and acquisition of interests in personal property — Real and personal property herein distinguished. — It has been shown in a previous section,[1] that the private property in lands is acquired from the State, and is held in subordination to the absolute property in lands, which is vested in, and can never be aliened by the State, as the representative of the

[1] See, *ante*, § 133.

public in organized society. It was also asserted and explained,[1] that in consequence of the public origin of all private property in land, there was but one constitutional limitation upon the power of the legislature to regulate the acquisition and transfer of estates in land, viz., that such regulations must not interfere or conflict with vested rights. Not only in the primary acquisition of land from the State, but also in the acquisition of it from former private owners, the State has the unrestricted power to determine the conditions and form of transfer, and the character of the estates so created, as long as there is no interference with vested right by a material obstruction or practical denial of the right of alienation of a vested estate. The regulations may be arbitrary in the extreme, but they cannot be subjected to any serious constitutional objection.

It is different, however, with personal property. All personal property is the product of some man's labor, and whether the owner has acquired it by his own labor, by inheritance or by exchange, his interest is a vested right of the most unlimited character. He does not hold it by any favor of the State, and in consequence of his possession of it he has assumed no peculiar obligation to the State. He has the right, therefore, to acquire it in any manner that he pleases, provided in so doing he does not interfere with or threaten the rights of others. Laws for the regulation of the conveyance of real property may be altogether arbitrary, provided the burden so imposed upon alienation does not amount to a practical prohibition of alienation. But in order that a similar regulation of the transfer of personal property may be lawful, it must serve some public good, and whether it does promote the public welfare is a judicial and not a legislative question. In neither case is there any likelihood that an arbitrary and wholly unreasonable regulation of the conveyance of property will be attempted.

[1] See, *ante*, § 134.

In both cases the legislature would usually be prompted to regulate conveyancing only by some public consideration, and hence the distinction here made, between real and personal property, in its application to the regulation of conveyancing, does not possess much practical importance. But a case may arise, in which the attempted regulation could, under this distinction, be declared unconstitutional, and hence it is highly proper that the distinction should be presented in this connection. The ordinary legislation, in the regulation of the conveyance of both real and personal property, has for its object either the prevention of fraud, the removal of doubt concerning the validity of one's title, or the facilitation of investigations of titles. For some one or more of these reasons, the sale of personal property is declared to pass a good title, as against a subsequent purchaser, or incumbrancer, only when the possession has been delivered, or the bill of sale is recorded; the chattel mortgage is required to be recorded; and all transfers of property are avoided in favor of existing creditors, which are not made upon some valuable and substantial considerations. All of these are reasonable regulations, for the restraint upon the rights of alienation and acquisition is but slight and serves a worthy and public purpose; for every one is interested in the prevention of fraud, as he is of all other trespasses on the rights of others.

But there is a greater likelihood of an arbitrary or unnecessary regulation of the interests or estates which one may acquire in personal property. As has been already explained, the State has the unrestricted power to determine the kinds and characteristics of the estates which may be created in lands; but the estate or interest in personal property may be as varied and unique as human ingenuity may devise, subject to the one limitation imposed by the nature of the article of personal property. Thus, for example, it is common to find it stated in law books that a future estate may be created in personal property, where the present

enjoyment does not involve neeessarily a consumption of the thing itself.[1] Of course, the creation of an estate in personalty of such a eharacter, that it will prove a public injury or a private wrong, may be prohibited, and all regulations of the creation of estates and interests in personal property may be instituted, which have in view the prevention of such wrongs. But except in a few rare cases, it is diffieult to see how any interest in personal property can be created whieh will have an injurious effeet on the public or third persons. One exceptional case is that of an interest so limited as to deprive ereditors of the right to subject the property to their lawful demands. A law, deelaring void all conditions against sale for debts, is undoubtedly constitutional, for the public is direetly interested in enforcing the payment of a debt. The contraction of a debt is a voluntary subjection of property to liability for it, and the possession of property, free from this liabilty for debt, would tend to induee and increase that wild and irresponsible speculation whieh does so much to produce fluctuations in values and financial disasters. It is, therefore, proper to prohibit such a limitation of both real and personal property.

§ 163. **Statute of uses and rule against perpetuity as regulations of personal property.** — It was proper and constitutional for the legislature or parliament to enaet the statute of uses, which has for its objeet the abolition of all uses, or other equitable interests, held separately from the legal title and estate, so far as it was held to apply to real property. For, although the ereation of such equitable interests was charged to be eonducive to the perpetration of fraud,[2] and that was the reason assigned for the enactment, the real purpose was the conservation and protection of those legal rights in land, sueh as the king's right of for-

[1] Tiedeman on Real Prop., § 546.

[2] Tiedeman on Real Prop., § 459; 1 Sedg. on Powers (ed. 1856), 78.

feiture on account of attainder, alienage and treason, and the manorial lord's wards, marriages, reliefs, heriots, escheats, aids, etc., which were special privileges imposed upon the tenants as burdens of tenure, and the evasion of which constituted the alleged perpetration of fraud. Inasmuch as the State can impose whatever conditions and limitations upon tenancies of land it pleases, uses and trusts issuing out of land may be abolished altogether. And although the limitation of the operation of the statute to uses issuing out of freehold estates in lands was the result of a technical construction of the statute, induced by the opposition of bench and bar to the statute itself, and not by any consideration of constitutional limitations upon the power of Parliament or of the American legislature to enact the statute; if the question were to be raised anew, the application of a statute, abolishing uses and trusts, to personal property may be resisted on the ground that it is unconstitutional to prohibit the creation of trusts in personal property.[1] The owner, as well as the purchaser of personal property, has a right to have the property in question conveyed to trustees to be held in trust; and the liberty and right of property of both are invaded in an unconstitutional manner, when a legislature undertakes to prohibit the creation of trusts in personal property.

In New York all passive trusts have been abolished, and only certain active trusts, enumerated in the statute, are now permitted. All other express trusts are converted by the statute into legal estates by the transfer of the seisin and estate to the *cestui que trust*.[2] So far as the statute limits the creation of active trusts in personal property, the constitutionality of the law must depend upon the evil effect upon others of the creation of such a trust. No

[1] The term "personal property," it must be observed, is used in this connection in the sense of chattels personal, including movable property of all kinds, but excluding chattel interests in lands.

[2] Tiedeman on Real Prop., § 470; N. Y. Rev. Stat., p. 727.

active trust in personal property can be prohibited which does not have some immoral or illegal purpose. It may be different with passive trusts. Since such legislation, as the New York statute just mentioned, is, whenever copied, usually accompanied with the statutory removal of all disabilities in respect to separate property from married women, there can be no sound or substantial reason for the existence of passive trusts. The creation of them may not produce any direct or positive harm, but they certainly tend to complicate the administration of the law, and for that reason the prohibition of them may possibly be justified.

Another case of regulation of the creation of interests in personal property, which may be subjected to serious criticism, is the application of the rule against perpetuity to personal property. In limiting the creation of future interests by will, the application of the rule can be easily justified, for the power to dispose of any property by will, in any manner whatever, depends upon the legislative discretion.[1] But in its application to future interests in personal property, created by conveyances *inter vivos*, it is hard, if at all possible, to find any constitutional justification for such legislation. Personal property is the product of man's labor, and he has the right during his life to make whatever use of it, or to dispose of it to any one, in any way, and under any terms that he pleases, provided that in so doing he does not inflict or threaten the infliction of any wrong or damage on others. It may be said that the prosperity of a country is advanced when the national wealth is not accumulated in the hands of a few, and the rule against perpetuity operates as a check upon such dangerous accumulations. But if such a reason served as a justification of this exercise of police power, it would justify the more severe, but, in principle, similar legislation, which would

[1] See *ante*, § 137, and *post*, § 164.

compel a man to confine his earnings to a certain amount, a regulation which has been urged by some labor reformers as a solution of the present industrial problems. There is no trespass, direct or indirect, upon the rights of others, in limiting a future interest in personal property, beyond a life or lives in being. And since the power to make such perpetual limitations of personal property does not depend, as does the like power in respect to real property, in any sense upon the sanction or grant of the State, it cannot be curtailed or taken away.

The application of the ordinary constitutional limitation to the exercise of police power in cases like these, may excite surprise, and is certainly novel. The general impression, both professional and popular, has been that there is no limitation upon the power of the legislature to regulate such matters. The long acquiescence in the legitimacy of such legislation tends to confirm the accepted doctrine, in opposition to the view here advocated. But if it be true that no regulation by the government of the natural rights of the individual is constitutional, which does not promote the public welfare by the prevention of a trespass upon the rights of others, it must be conceded that in cases like these, the limitations upon the power of the government have their full force and effect, and that it is the duty of the courts to see that the legislature in the exercise of its police power keeps within these constitutional limitations.

§ 164. **Regulation and prohibition of the sale of personal property.** — It is one of the absolute rights of the individual to be free from unreasonable restraints upon the sale or transfer of his personal property. The right to sell or transfer one's property is as much an inalienable right as that of enjoyment of the property free from unnecessary restrictions. Of course, the right to sell may be subjected to whatever regulations may be needed to pre-

vent any threatened injury to the public or to third persons. In the discussion of the police regulation of trades and employments, the regulation and prohibition of the sale of personal property, as a trade or occupation, have been discussed at length; [1] and, inasmuch as all such regulations are designed to control the sale of merchandise, as a trade, they are considered and criticised in the character of restraints upon the liberty of exercising a lawful calling, rather than as an invasion of the rights of property. In the main, the same objections apply to a police regulation, whether it is considered to be an infringement of personal liberty or of the rights of property. It will, therefore, not be necessary to discuss all such regulations in detail in this place, as it would be hardly more than a repetition of what has already been written.[2] But in the application of the principles there set forth, as limiting the police regulation of employments and of the sale of personal property, a distinction should be drawn between the selling of personal property as a trade, and as a solitary or occasional exercise of a right of ownership. The sale of certain personal property, as a trade, may be liable to become harmful to the public, and for that reason may properly be subjected to police regulation; whereas the mere act of selling the article of merchandise, independently of being the ordinary occupation of the seller, would contain no element of danger to the public, and therefore cannot be subjected to any police regulation whatever: and wherever the two acts can be separated, the regulation must be confined to those cases in which the selling, on account of its frequency, or of its connection with the sale of other similar articles of merchandise, assumes the character of a trade or occupation. Regulations for the prevention of fraud are, probably in every case, applicable to the unusual, as well as to the

[1] See *ante*, chapter IX., and particularly §§ 89, 96, 107, 108, 119, 120–125.

[2] See especially, §§ 89, 120–125.

ordinary sale of personal property; so that, for example, in order to make a valid sale, as against a second purchaser, the possession must be delivered, independently of the frequency or infrequency of the act.[1]

But there are other cases of police regulation, which are designed to correct evils, which only arise in connection with the prosecution of a trade or occupation. Thus, for example, the sale of unwholesome food by a grocer may be prohibited altogether, in the course of his regular business, for his business is the sale of food for human consumption; and the sale by him of unwholesome food to his regular customers will almost necessarily inflict injury on the public health. And so would the sale of such food be likely to prove harmful to the public, if it should be sold by any casual owner for the purpose of being used as an article of food. But if it were sold, independently of one's business as a vendor of human food, for some other lawful purpose, its sale could not be prohibited, for it contains no element of danger to the public health.

Conceding the position maintained in a previous section,[2] that the sale of liquor in saloons, to be drunk on the premises, is the only case of the sale of intoxicating liquors which may be prohibited; and that the ground for the justification of prohibition in that case is the fact, that liquor saloons are the resort of all the more or less lawless elements of society, and consequently the public peace is endangered by their presence in the community; it is easy to understand how the prohibition of liquor saloons may be justified, and yet the application of the prohibitory law to an unusual or single case of the sale of liquor, to be drunk on the premises, by one who is not a saloon keeper, may be resisted on constitutional grounds. The latter case could

[1] See in confirmation of the text. Conrad *v.* Smith (N. D.), 70 N. W. 815.

[2] See *ante*, § 125.

not threaten a disturbance of the public peace, any more than the intemperate use of liquor, in whatever way it may be procured, is likely to do so. The cases in which this distinction would be likely to find application, are rare, and the subject need not be given any further attention.

In the sale of certain liquids, particularly milk, bottles are used, which are stamped with the name of the owner, who supplies their contents, and who, on account of the value of the bottles, desires them restored to his possession, after the customers have removed the contents. Apart from the value of these bottles, the unauthorized use of them by other dealers in the same commodities would furnish a ready opportunity to commit the fraud of palming off on future customers a spurious or inferior article as the product of the owner of the stamped bottles. For these reasons, a statute was passed in New York, which provides for the registry of stamped bottles, and prohibits the sale of them by any one without the consent of the owner, making such unauthorized sale of them a criminal misdemeanor. In its enforcement in the case of the sale of stamped milk bottles, the constitutionality of the law was attacked on the ground that the purchaser was thereby deprived of his right of property, in violation of constitutional guaranties. This plea was, however, denied, and the law was sustained.[1]

For the purpose of preventing the practice of fraud in the sale of intoxicating liquors, especially whisky, the distillers are in the habit of bottling the liquor under bond to the United States government, and sealing them with the government stamp, which denotes the age and guarantees the purity and strength of the liquor. An act of Congress makes it a criminal offense to fill up these bottles again, and to sell the substituted liquor in them, without completely removing the stamps and labels. There can be no

[1] People *v.* Cannon, 63 Hun, 306; *s. c.* 139 N. Y. 32; People *v.* Quinn, 139 N. Y. 32; People *v.* Bartholf, 139 N. Y. 32; Bell *v.* Gaynor, 36 N. Y. S. 122; 14 Misc. Rep. 334.

question of the constitutionality of such laws. Nor would it be unconstitutional for a law to prohibit altogether the re-use of liquor bottles, which by their peculiar shape would be likely to mislead the purchaser as to the character of the contents.

The labor leaders have secured the enactment in some of the States, notably New York, of a law which prohibits the manufacture and sale of any goods, which are made with convict labor. Inasmuch as the convicts and the penitentiaries are under the complete control of the State authorities, and no personal rights can possibly be affected, if such a law were to operate only prospectively, as to the future products of convict labor, such a law in its prospective operation is clearly constitutional. But if it were made to operate retrospectively upon goods, which were made by convict labor prior to the enactment of the prohibitive law, there would be an unconstitutional interference with the right of private property of the owner of the goods so made. And it has been held that the law cannot act retrospectively, so as to annul a contract, not yet performed for farming out convict labor, which was made in accordance with the current laws of the State.[1]

§ 165. **Laws regulating disposition of personal property by will.**[2] — The right of disposing of one's property as one pleases, by transfer or conveyance *inter vivos*, is an indefeasible incident of the right of property in personalty. The transfer of real property may, under certain limitations, be restrained or prohibited according to the discretion of the legislature, since lands are acquired by grant from the State,[3] subject to the right of the State to determine the conditions and terms upon which they are to be held. But

[1] Bronk *v.* Barckley, 43 N. Y. S. 400.

[2] See *ante*, § 137*a*, where the subject of the regulation of the right of inheritance is more fully discussed.

[3] See *ante*, § 119.

that cannot be done with personal property. Personal property is the product of man's labor, instead of being the free gift of nature, and one's right of property is derived from the exercise of dominion over the thing.

It is a part of that lawful dominion over the thing, that the owner has the right to sell or give it away. But the natural right of property, and consequently the natural right of disposition of it, lasts only as long as the natural dominion. When that control which one may claim in consequence of the actual or constructive possession of the thing ceases, the natural right of disposition ceases; and if one has under the law any further control of the thing, it must rest upon positive law. It is, therefore, a legislative privilege, and can therefore be taken away by the same power which gave it. It will, therefore, be conceded that the right to dispose of personal property by will rests upon positive or statutory law, and is therefore subject to legislative regulation and prohibition without limitation. It is not disputed that such is the rule in respect to the disposition of lands by will,[1] for we know that the present right to devise lands depends upon the authority of the English statute of wills, enacted in the reign of Henry VIII., or of some American statute, designed to take the place of the English statute; whereas the right to dispose of personalty by testament comes down to us as a common-law right.[2] But there can be no doubt that the right to bequeath personal property is as much the creature of positive law, as the right to devise lands. This was the position taken by the Supreme Court of Ohio in a case, in which an act of the legislature was sustained, which provided that a bequest, by a testator leaving issue living, to any religious or charitable purpose, shall be void, if made within twelve months of the testator's death. The enactment operated as a re-

[1] See *ante*, § 119.

[2] See 2 Bla. Com. 491, 492.

straint upon the right to dispose of his personal property by will. In delivering its opinion, the court said: "We hold that the right to acquire property implies the right to dispose of it. But the inalienable rights here declared, as well as those implied, are possessed by living, not dead, men. A disposition by will does not take effect during the testator's life, but operates only after his death. While the right of testamentary disposition may be, as Mr. Redfield in his work on wills says, instinctive, it nevertheless depends solely on municipal law, and has never been regarded as a natural or inalienable right. It has always been subject to the control of legislative power, and such power is not limited in this State by a constitutional provision." [1]

§ 166. **Involuntary alienation.** — It is true with personal as with real property, that as a general rule the property of one man cannot by legislative enactment be taken away and given to another. Not only is this true in respect to known and recognized owners of personal property, but it is also true, where the property is not claimed by any visible or known owner. Thus it was held in North Carolina to be unconstitutional for the State by statute to appropriate the unclaimed dividends of private corporations to public uses.[2] For the same reasons the legislative diversion of a bequest to a different use, than what was provided by the donor, was held to be unconstitutional, although in both cases the State was the beneficiary. The diversion was an interference with the reversionary interest of the donor's heirs.[3] But, notwithstanding this general rule, there are a few exceptional cases in which the State may lawfully dispose of one's personal property against his will. They are principally the same as have already been explained and justified

[1] Patton *v.* Patton, 39 Ohio St. 590.

[2] University of North Carolina *v.* N. C. R. R., 76 N. C. 103 (22 Am. Rep. 671).

[3] Trustees Brooks Academy *v.* George, 14 W.Va. 411 (35 Am. Rep. 760).

in reference to the involuntary alienation of real property;[1] and, the reasons for this exercise of police power being the same in both cases, there is no need for a repetition in this place. It seems to be very doubtful whether there is any room for the application of the principles of eminent domain to personal property. Mr. Cooley says that the State may in the exercise of its eminent domain, appropriate to a public use private property of every description.[2] This is confounding the meaning of terms. Eminent domain means that superior and absolute right of property which the State, as the legal representative of organized society, has in the lands within its borders, and subordinate to which all private property therein is held. In cases of extreme public necessity, it is quite probable that the State may appropriate the personal property of the citizen on payment of its full value. At least this is the case in time of war. The governments of all civilized nations exercise this power of appropriation of personal property, in order to supply themselves with whatever is needful in the prosecution of the war; and the forcible and irregular seizure of property by military commanders has been justified, when the necessity was urgent and such as will admit of no delay, and where the civil authority would be too late in providing the means required for the occasion.[3] Not only does the State, in time of war, appropriate whatever personal property it may need for the prosecution of the war, as food or ammunition or weapons of warfare, but it more frequently makes forced loans of capital from its people by compelling them to accept its treasury notes as legal tender in payment of debts both public and private.[4] And it is quite likely that

[1] See *ante*, § 138.

[2] Cooley Const. Lim. 649, 652, 653.

[3] Farmer *v.* Lewis, 1 Bush (Ky.), 66. See Harmony *v.* Mitchell, 1 Blatchf. 549; Mitchell *v.* Harmony, 13 How. 115. See Republica *v.* Sparhawk, 1 Dallas, 363; Parham *v.* Justices, 9 Ga. 341.

[4] See *ante*, § 91.

the State may, in any other case of extreme necessity, appropriate whatever of private property may be needful to satisfy some urgent general want. Suppose, for example, in the case of a general failure of the crops, a famine should occur, and those who did possess stocks of provisions refused to sell at any reasonable price, or refused to sell at all, while people were brought to the extremity of starvation. Could not the State compel those, who had a "corner" on the provision market, to deliver up their property for the public good, on payment of a reasonable price? Every one has a right to put on his goods whatever price his judgment, his cupidity, or other feeling, may prompt, and the State cannot ordinarily regulate the price of commodities.[1] But when the public want of food becomes so great, that the failure to satisfy it will be sure to give rise to serious disturbances of the public peace and the violent appropriation of the food that is denied them, it is idle to speak of the sacredness of private property. It cannot be doubted that an official appropriation of articles of food, under circumstances of such urgent necessity, would be judicially justified on the plea of necessity, however illogical it may seem. But all other means of satisfying the public hunger must first have been exhausted, before the selfish proprietor of the scarce articles of food may be forcibly subjected to instruction in the graces of Christian charity.[2]

§ 167. **Control of property by guardian.** — The control of the ward's property is so common an authority of the guardian, that it is altogether unnecessary to refer to cases in support of the constitutionality of a law which invests the guardian with this control over the property of the infant ward. The helplessness of the minor, and his inability to manage his property in a careful manner, resulting from his immaturity, constitute sufficient reasons for taking from

[1] See *ante*, § 107.

[2] As to the sale of estrays, see *post*, § 175.

him the control of his property. The powers of the guardian are dependent upon the provisions of the law, and are constantly subject to legislative regulation and change. The common law gave to the guardian of a minor the power to manage his real estate, lease it and collect the rents, make repairs, etc., but he had not the power to make a sale of it in fee, without an order from a court of equity. And this is the general rule, in this country, at the present day.[1] But the guardian has, in the absence of statutes to the contrary, the ordinary power of selling and disposing of the personal property of the minor, whenever he should deem it advisable to do so.[2] And it seems that, after a guardian has been appointed and has taken charge of the ward's estate, he acquires such a vested interest in the property during the guardianship, that a law would be unconstitutional, because it deprived him of a vested right, which provided for the sale of the minor's property by another, even though the other person be the mother of the ward.[3]

Not only is it a legitimate exercise of police power to place the control of a minor's property in the hands of a guardian; but it is equally competent to place under guardianship the person and property of all other persons, who from any cause may become unable to take care of themselves. There can be no doubt of the power to treat the insane in this manner. And it has been held to be competent, in the exercise of the police power, to place habitual drunkards under guardianship. The assumption by the guardian of the control of the property of the drunkard would not be an unlawful deprivation of property. The derangement of mind, resulting from habitual intemperance, would place him in the same category with the ordinary insane.[4]

[1] See Schouler Dom. Rel. 480–487.

[2] See Schouler Dom. Rel. 461-479.

[3] Lincoln *v.* Alexander, 52 Cal. 482 (28 Am. Rep. 639).

[4] Wadsworth *v.* Sharpsteen, 8 N. Y. 388; Imhoff *v.* Whitmer, 21 Pa. St. 243; Devin *v.* Scott, 34 Ind. 67.

The claim has also been made that the property of spendthrifts may be taken from them and placed under the control of a guardian or curator.[1] But it would appear to be a very difficult matter to determine just what degree of extravagance will make the possessor of property a spendthrift. And before that difficulty could be overcome, it would be necesary to determine what makes one a spendthrift. Webster defines a spendthrift to be "one who spends money profusely or improvidently." If that be taken as a correct definition, it would be difficult to discover in it the element which would justify this exercise of police power. If it be established that his improvident expenditures are the acts of a deranged mind, then he could lawfully be placed under guardianship, on the ground that he is suffering from a form of dementia. But if a perfectly sane man chooses to spend a fortune in high living; prefers the pleasures of a riotous life, with poverty in advanced years, to an equable and moderate expenditure of his income, with the enjoyment of ease and comfort through life, and a proper provision for his heirs; who can lawfully hinder him from making the choice? A man can do what he please with his own property, provided he does not interfere with or transgress some vested right of another. He may, like Raphael Aben Ezra, give away his entire fortune, and become a beggar and a wanderer upon the face of the earth; and no one in a free State dare deny him that privilege. And what he could give away, without receiving any equivlent therefor, he may dispose of in riotous living.

§ 168. **Destruction of personal property on account of illegal use.**[2] — In a variety of cases, it has been provided, as a penalty for the infraction of the law, that the implements used in the prosecution of an unlawful trade, or in

[1] See Schouler Dom. Rel. 404.

[2] In respect to the destruction of domestic animals for being nuisances, see *post*, § 175.

the doing of an illegal act, shall be seized and destroyed. It is a most common provision in the laws for the regulation and prohibition of the sale of intoxicating liquors.[1] The same provision has been made to apply to nets and other implements employed in illegal fishing;[2] so also in respect to the stock in trade of a gambler,[3] or of a counterfeiter.[4] But in all of these cases the seizure and destruction must rest upon a judgment of forfeiture, procured at the close of an ordinary trial, in which the owner of the property has had a full opportunity to be heard in defense of his property.[5] Conceding in every case the illegality of the use to which the property has been put, the constitutionality of the statute cannot be questioned, when the proper hearing is provided for before condemnation.

The authorities do not, however, sustain the text altogether in the statement that things, which are being used in violation of law, cannot be lawfully destroyed without a judgment for condemnation in proceedings in which the owner of them has had an opportunity to be heard in his defense. The courts seem to justify summary destruction without condemnation proceedings in every case in which the illegal character of the things or of their use is unmistakable, and in which the value of the things destroyed is comparatively trivial. Thus in the case of the

[1] State *v.* Miller, 48 Me. 576; State *v.* Snow, 3 R. I. 54; Green *v.* James, 2 Curt. 187.

[2] Jeck *v.* Anderson, 57 Cal. 251 (40 Am. Rep. 115); Weller *v.* Snover, 42 N. J. L. (13 Vroom) 341; Lawton *v.* Steele, 51 Hun, 643; *s. c.* 119 N. Y. 226; *s. c.* 152 U. S. 133; Bittenhaus *v.* Johnston, 92 Wis. 588; State *v.* Lewis, 134 Ind. 250; Peters *v.* State, 96 Tenn. 682; State *v.* Owen, 10 L. D. 163; *s. c.* 3 Ohio N. P. 181; State *v.* Mrozinski, 59 Minn. 465; People *v.* Bridges, 142 Ill. 30; Osborn *v.* Charlevoix Circuit Judge, 114 Mich. 655.

[3] Lowry *v.* Rainwater, 70 Mo. 152 (35 Am. Rep. 420); Glennon *v.* Britton, 155 Ill. 232.

[4] Boyd *v.* United States, 116 U. S. 616.

[5] Greene *v.* James, 2 Curt. 187; Jeck *v.* Anderson, 57 Cal. 251 (40 Am. Rep. 115); Lowry *v.* Rainwater, 70 Mo. 152 (35 Am. Rep. 420).

law of New York, which authorizes the game protectors to destroy summarily: "Any net found, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained in or upon any of the waters of this State, or upon the shores or islands in any waters of this State, in violation of any existing or hereafter enacted statutes or laws for the protection of fish," the United States Supreme Court joins the New York Court of Appeals in sustaining its constitutionality, notwithstanding condemnation proceedings are not first required.[1] Thus, in the case cited the United States Supreme Court says on this point: —

"It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a customs officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property was of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips and dice of a gambling room." [2]

[1] Lawton *v.* Steele, 119 N. Y. 226; *s. c.* 152 U. S. 133.

[2] See, also, to same effect, State *v.* Owen, 10 L. D. 163; 3 Ohio N. P. 181; Bittenhaus *v.* Johnson, 92 Wis. 588; Glennon *v.* Britton, 155 Ill. 232 (in reference to the destruction of gambling implements).

§ 169. **Destruction of personal property in the interest of public health.** — Elsewhere, in more than one place, the discussion of modern police regulations has revealed the tendency of judicial and public opinion to translate the maxim, *salus populi suprema lex;* the public health is the highest law; and whenever a police regulation is reasonably demonstrated to be a promoter of public health, all constitutionally guaranteed rights must give way, to be sacrificed without compensation to the owner. The sacred right of property, so jealously guarded against infringement or trespass in other cases, whether at the hands of the State or of other private persons, is freely invaded, whenever such invasion is made in the promotion of the public health. And the courts unite in the grave statement, when property is taken or destroyed, in order to promote the public health, or to prevent the spread of infectious or contagious diseases, that it is not a taking of private property in the constitutional sense, which is either prohibited altogether, or is only permitted upon payment of full compensation to the owner. The destruction of beds, bedding and clothing, which have been used by a sufferer of some deadly infectious or contagious disease, is authorized wherever disinfecting by fumigation or otherwise is not considered by the health officers to furnish a sufficient protection against contagion. So far as I know the destruction of such property by the boards of health has never been questioned; possibly, because the cases have become rare, on account of the great advance which has been made in the effectiveness of fumigation and of other disinfectants which have been discovered. Certainly, the destruction of property, when the use of disinfectants will furnish the required protection against contagion, would be pronounced to be a useless trespass upon the right of property, and hence to come within the inhibition of the constitutions.

The power of the State to destroy property, in order to

prevent the spread of disease, has been most actively resisted in the case of diseased animals. This determined resistance to such regulations may be occasioned, either by the greater value of the property so destroyed, or by the absence of a popular conviction that the destruction of the diseased animals is necessary to the preservation of the public health. A herd of Jersey milch cows is treated, as is required by the laws of New York, and of other States, to injections of tuberculin, the medicine which is declared to have the power of disclosing the existence in animals of latent or concealed tuberculosis; and the animals which, under this treatment, develop tuberculosis, are knocked in the head, because the medical profession, under the modern bacterial or general theory of diseases, have come to the generally accepted conclusion that the dreaded disease of tuberculosis may be transmitted to a human being who drinks the milk or eats the flesh of a tuberculous animal. Many owners of such herds of cattle, perhaps the majority of them, blinded by their own pecuniary loss, when for this cause and reason their valuable cattle are destroyed, repudiate the medical theories upon which the act of destruction is based, and by which it is justified, and consider it a wanton and unjustifiable taking of private property. But the courts have uniformly sustained all laws which provide for the destruction of diseased animals, and deny the owner's claim to compensation for his loss.[1]

On the same principle, it has been held to be a lawful exercise of the police power to provide for the destruction, without compensation, of trees which are affected with a disease called the "yellows."[2]

[1] Newark & S. O. H. R. Co. *v.* Hunt, 50 N. J. L. 308; Loesch *v.* Koehler, 144 Ind. 278; Dunbar *v.* City Council of Augusta, 90 Ga. 390. In the Indiana case, it is also expressly declared to be unnecessary to the legality of the act of destruction in such a case, that the owner should be previously notified.

[2] State *v.* Main, 69 Conn. 123.

§ 170. **Laws regulating the use of personal property.**— While personal property is protected by constitutional limitations against all unnecessary interference and regulation, it is a standard rule of police power that one must not make such a use of his property as to injure another; and, consequently, the use and enjoyment of personal property may be subjected to such police regulations as may be necessary to prevent any threatened injury to the public. The proof of the existence of a threatened injury, and of the appropriateness of the proposed regulation as a remedy, will always justify the interference. Its efficacy is not a matter for judicial consideration. Laws for the regulation of the use of personal property may be as varied as the uses to which such property can be put; and it is only possible to refer to a few exemplary cases which have come up before the courts for construction.

§ 171. **Prohibition of possession of certain property.** — In the first place, the very possession of personal property, coupled with an intent proven or presumed, may be such a public evil as to justify the prohibition of such a possession. Thus, a Rhode Island statute forbade the possession with intent to sell or exchange, of adulterated milk, and it was declared to be constitutional.[1] But the unlawful intent would, in such a case, have to be proven. Without this intent, the possession of the adulterated milk neither produces nor threatens any harm to the public; and since adulterated milk may be put to some other use, which is not, and cannot, be prohibited, the unlawful intent to sell cannot be presumed from the mere possession. A New York statute makes the possession of stamped bottles or cans, *prima facie* evidence of unlawful use or purchase of the same, in violation of the statute and of the right of property therein of the owner.[2]

[1] State *v.* Smyth, 14 R. I. 100 (51 Am. Rep. 344).

[2] People *v.* Cannon, 139 N. Y. 32; People *v.* Quinn, 139 N. Y. 32; People *v.* Bartholf, 139 N. Y. 32.

And the statute authorized the owner to empty the contents into the street.[1]

But it is different when the thing cannot be put to any unobjectionable use. In such a case the thing cannot be presumed to be of any value to its owner except on the hypothesis, that he intends to make this injurious use of it, and hence the wrongful intent may be presumed from the act of the possession. Thus the constitutionality of a statute was sustained, which imposed a penalty upon any one who should have in his possession any dead game in certain seasons of the year.[2]

A New York statute, aiming to put a stop to the fraudulent sale of silver articles, as sterling, and marked "sterling," which do not contain the proportion of silver which the trade requires to make an article sterling, makes the possession of such fraudulent articles a criminal misdemeanor. The proportion of silver, which is required by the statute to authorize the use of the stamp "sterling" is $\frac{925}{1000}$.[3]

§ 172. **Regulation and prohibition of manufacture of certain property.** — As a general proposition, it can hardly be doubted that one has a constitutional right to change the form and condition of his personal property to whatever extent he may see fit; and he may make a business of manufacturing a given article, provided he does not threaten the public with any injury. And it may be safely stated that the manufacture of no useful article may be prohibited altogether. If the article can be put to a lawful and rightful use, it matters not how likely it will be used in a way harmful to the public, the right to manufacture it cannot be prohibited altogether. As has been already explained, in setting forth the various regulations that may

[1] Monroe Dairy Association *v.* Stanley, 65 Hun, 163.

[2] Phelps *v.* Racey, 60 N. Y. 10 (19 Am. Rep. 140).

[3] People *v.* Webster, 40 N. Y. S. 1135; 17 Misc. Rep. 410.

be applied to trades and occupations,[1] the manufacture of the article may be subjected to whatever regulations may be necessary to guard the public against injury in the process of manufacture, or afterwards in a wrongful use of it. Those who engage in its manufacture may be required to submit to a certain examination, in order to ascertain their fitness for the business, and to take out a license, if the manufacture requires such regulations. And if the danger to the public of a wrongful and illegitimate use of the manufactured article be so imminent as to call for such legislation, as seems very likely to happen with reference to the manufacture of dynamite, nitro-glycerine, and other like explosive compounds, the manufacture of it for the purpose of sale, that is, as a business, may be prohibited to all but a few licensed manufacturers or the agents of the State. But if, in the actual manufacture of the thing, without police supervision, as in the case of dynamite, there is no danger to the public, the fact that it can be put to a wrongful use will not justify legislation which probibits the owner of the raw material to manufacture the article which he does not intend to sell, but to make use of in a legitimate way. The manufacture of dynamite may be prohibited, as a business, to all but licensed manufacturers, because his intention to sell makes it very likely or at least possible that the identical stuff will be employed in some unlawful way, but when one manufactures it for his own lawful use, he has done nothing to disturb the public safety.

The regulations concerning the manufacture of metallic money are of this character of police regulations. It is true, that the sole power of coining money is given by the United States constitution to the national government.[2]

[1] See *ante*, §§ 89, 119-128. To these sections the reader is referred for the full and complete statement of the regulations which are properly discussed under the heading of the present section.

[2] U. S. Const.

But except as a restriction upon the power of the States, the constitutional provision was not necessary. It certainly was not needed to authorize the prohibition of the manufacture of metallic money by the individual. For whatever scientific objections may be made to such regulations by sociological writers, it cannot be denied that the free and indiscriminate coinage would lead to the perpetration of many frauds on those who are least able to discover them. For this reason, the government reserves to itself the right to coin money, and punishes severely any counterfeiting of the coins of this and of any other country.[1] Not only this; but it is also prohibited to any one to manufacture for distribution, as an advertisement, or for any otherwise lawful purpose, any metallic pieces with shape and impressions so resembling the shape and impressions of money coins, that there is danger that they may be made the means of practicing frauds upon the unwary.[2]

But in all of these cases it is a judicial question, whether the manufactured article is calculated to prove an instrument of trespass on the rights of others, and the prohibition of its manufacture can only be justified by an affirmative answer to this inquiry. The absolute prohibition of the manufacture of intoxicating liquors can only be justified by proof of the fact that intoxicating liquors cannot be put to some beneficial use. This is conceded to be false by all, whatever may be their other views on legislation in aid of temperance, and most of the present legislation permit its manufacture and sale for medicinal and mechanical purposes. If the position of temperance reformers, that the use of intoxicating liquors as a beverage is a wrong or trespass on society, cannot be successfully assailed, then the constitutionality of a law, which prohibited the manufacture of it except by certain licensed manufacturers, or by

[1] See U. S. Rev. Statutes, §§ 5457, 5458. See *post*, § 227.

[2] See U. S. Rev. Stat., § 5462.

the State officers, could not be questioned. Although it would be unreasonable to confine its manufacture to licensed agents of the State, merely for the purpose of preventing the sale to habitual drunkards, lunatics and minors — great as that evil is, the number of such purchasers does not bear comparison with the immense number of those who buy and use it in moderation; — still the constitutionality of the regulation could not be attacked, for the necessity of the legislation is a legislative and not a judicial question.[1]

§ 173. **Carrying of concealed weapons prohibited.** — For the purpose of preventing or reducing the number of street affrays, which, it is claimed, the habit of carrying concealed weapons increases to a most alarming frequency, in most of the States there are now statutes in force, prohibiting the carrying of concealed weapons. Apart from a provision of the constitutions of the United States, and of the several States, which guarantees to every citizen the right to bear arms, there cannot be any serious constitutional objection raised to this regulation. It cannot be questioned that the habit of carrying concealed weapons tends to endanger strife, for the very act indicates the expectation of a possible use for the weapons. The prohibition of carrying concealed weapons is, therefore, an appropriate remedy for the suppression of street affrays. The American constitutions guarantee to every citizen the right to possess and bear arms, in time of peace as well as in war; and no binding law can be passed by Congress or by a State legislature, prohibiting altogether the carrying of weapons of warfare. But the law against the carrying of concealed weapons is not a total prohibition. It is only a reasonable regulation, established to prevent a serious injury to the public in the enjoyment of this constitutional

[1] See *ante*, § 125, for a general discussion of the prohibition of the liquor trade.

right. It only prohibits the carrying of *concealed* weapons, and does not interfere with any other mode of carrying them. It is the concealment which is calculated to produce harm to the public. Any one, carrying a weapon for a laudable purpose, will not desire to conceal it. The law against the carrying of concealed weapons has in many cases been declared to be constitutional.[1]

It has been held within the police power of the government of the State of Massachusetts to forbid the parade of unauthorized bodies of armed men, if exceptions are made in favor of the military forces of the State and of the United States.[2]

§ 174. **Miscellaneous regulations of the use of personal property.** — In Missouri, a municipal ordinance conferred upon one person the right to remove and appropriate all carcasses of animals found in the city and not slain for food, to the exclusion of the owner. The statute was subjected to judicial construction, and it was held to be unconstitutional, so far as it applied to carcasses, which have not become a nuisance, although not slain for use as food.[3] As long as the carcasses of animals are not a nuisance to the public, because of their effect upon the public health, they are as much protected by constitutional guaranties, as are the live animals.

The agricultural communities of the South suffer greatly

[1] Miller *v.* State, 153 U. S. 535; Munn *v.* State, 1 Ga. 243; Aymette *v.* State, 2 Humph. 154; State *v.* Buzzard, 4 Ark. 18; State *v.* Reid, 1 Ala. 612; State *v.* Mitchell, 3 Blackf. 229; State *v.* Jumel, 13 La. Ann. 399; State *v.* Smith, 11 La. Ann. 633; English *v.* State, 35 Tex. 472 (14 Am. Rep. 374); State *v.* Wilforth, 74 Mo. 528 (41 Am. Rep. 330); State *v.* helby, 90 Mo. 302; North *v.* People, 139 Ill. 81. In Haile *v.* State, 38 Ark. 564 (42 Am. Rep. 3), a statute was held to be constitutional which prohibited the carrying of army pistols, unless uncovered and in the hand.

[2] Commonwealth *v.* Murphy, 166 Mass. 171.

[3] River Rendering Comdany *v.* Behr, 77 Mo. 91 (46 Am. Rep. 6).

from the depredations of thieves on the unharvested crop, and particularly from the stealing of cotton. As a means of checking this pillage, a statute was enacted in Alabama, which made it unlawful "for any person to transport or move after sunset and before sunrise of the succeeding day," within certain counties, "any cotton in the seed," but permitted the owner or producer to remove it from the field to the place of storage. This was held to be a reasonable police regulation, and not an unconstitutional interference with the rights of private property.[1] It is a rather peculiar regulation, and may possibly be open to scientific objection, but it is no doubt constitutional. It is made in the interest of the farmer; and since the statute reserves to the owner or producer the right to remove the cotton after nightfall from the field to a place of storage, the regulation may be considered as being confined to the prohibition of all trading or dealing in cotton after sunset and before sunrise and does not interfere with any other harmless use of it by the owner.

As a part of the general law of the road, it is not unfrequently provided that certain kinds of vehicles shall not be driven or ridden on certain roads and streets. I do not know that the constitutionalty of these laws has ever been questioned, save in the case to which reference will now be made. In North Carolina a law, prohibiting the riding of bicycles on turnpike roads, was declared to be a constitutional exercise of the police power, the frightening of farmers' horses being the chief reason for the enactment of the law. Doubtless, at the present day, even in North Carolina, and certainly generally throughout this country, the bicycle has become so well known to the horses that the riding of the bicycle has ceased to be a source of danger to the drivers of horses. It is, for this reason, unlikely that this decision would now be sustained by the

[1] Davis v. State, 68 Ala. 58 (44 Am. Rep. 128).

courts of other States.[1] A rule of county commissioners, forbidding the riding of bicycles across bridges, was sustained in Maryland, under the grant of power "to make reasonable rules and regulations for the use" of bicycles.[2]

§ 175. **Laws regulating use and keeping of domestic animals.** — The common law has always recognized a right of property in domestic and domesticated animals, the keeping of which serves some useful purpose, such as cows, sheep, fowls, horses, oxen, etc.; and now a certain right of property is recognized in every species of animal, which may be subjected to the control of man, whether they retain their wild nature in whole or in part, or whether it is completely subdued. The only difference between the right of property in a cow or other completely domesticated animal and in some wild or half-tamed beast, is the degree of care required in the keeping of them, in order to prevent injury to the public. For the common law required the owner of every kind of animal to so guard and keep him as that no injury should result to another; and gave to the one injured a right of action for damages against the owner of the animal, if he had not exercised that degree of care which in ordinary cases may be required to avert an injury to others.[3] Thoroughly domesticated animals, such as cattle, sheep, swine, and the like, which may reasonably be presumed to exhibit no vicious propensity, are at common law permitted to go at large, and the owner is only responsible for damages when he permits the animal to go at large, when he knows of his vicious propensity. For without such knowledge he could not have anticipated any injury to others, and he was therefore guilty of no negligence.[4] But all animals, whether tame or wild, are liable in quest

[1] State *v.* Yopp, 97 N. C. 477.

[2] Twilley *v.* Perkins, 77 Md. 252.

[3] Cooley on Torts, 348–350.

[4] Cooley on Torts, pp. 341–348, and cases there cited.

of food to trespass upon the lands adjoining the highway; and the owner of an animal incurred at common law a liability for all trespasses made by animals which he allowed to go upon the highway unattended.[1] But if one is driving cattle through the highway, as one has a right to do, independently of statute, and one of the animals should get away from the herd, and trespass upon the adjoining land; if he has exercised all the care that may be expected, under the circumstances, from a reasonably prudent man, the owner of the land cannot recover of him for the damage. It is a case of *damnum absque injuria*.[2]

Respect for public decency would require the owners of stallions and bulls to keep them carefully housed, and the law may very properly prohibit the keeping and exhibition of them in public places.[3]

This is a summary statement of the common-law rights of property in animals and their attendant duties. But of course they may be subjected to further statutory regulation, and they have been. In every State the keeping of live stock is under police regulation. In some communities the common-law rule still prevails, that the owners of stock are liable for all trespasses of their stock upon the lands of others, although there is no inclosure about the land, where they allow their stock to roam at large. In other communities the owners of lands are required to maintain inclosures that will be an effective barrier to all trespasses of stock, and a right of action is given for only those trespasses which occur in spite of the inclosure. The clash of interest between stock-raising and farming calls for the interference of the State by the institution of police regulations; and whether the regulations shall subordinate the stock-raising interest to that of farming or *vice versa*, in the case of an irreconcilable difference, as is the case with respect

[1] Cooley on Torts, and cases there cited.

[2] Cooley on Torts, 341.

[3] Nolin *v.* Franklin, 4 Yerg. 163.

to the going-at-large of cattle, is a matter for the legislative discretion, and is not a judicial question. In the exercise of this general power of control over the keeping of live stock, the State or municipal corporation may prohibit altogether the running at large of such animals, and compel the owners to keep them within their own inclosures; and provide as a remedy for enforcing the law that the animals found astray shall be sold, after proper notice to the owner, and time allowed for redemption, paying over to the owner the proceeds of sale, after deducting what is due to the State in the shape of penalty.[1]

A city ordinance was sustained in California, which prohibited the keeping of more than two cows within certain limits of a city.[2] But a law was declared to be unconstitutional, which required the owners of lands to exterminate at their own expense the ground squirrels which may be living thereon, and to suffer a penalty if it be not done within a stated time. This was declared to be neither a police, sanitary or kindred regulation.[3] The chief objection to this regulation would seem to be its unreasonableness, somewhat akin to the requirement that owners of lowlands shall drain the same at their own expense; except that the damage to crops, instead of injury to health, is the occasion of the regulation.

§ 176. **Keeping of dogs.** — Laws for the regulation of the keeping of dogs are very much more common than the

[1] Jones *v.* Brim, 165 U. S. 180; Campen *v.* Langley, 39 Mich. 45 1(33 Am. Rep. 414); Wilcox *v.* Hemming, 58 Wis. 144 (46 Am. Rep. 625); Rockwell *v.* Nearing, 35 N. Y. 302; Campbell *v.* Evans, 45 N. Y. 356; Cook *v.* Gregg, 46 N. Y. 439; Varden *v.* Mount, 78 Ky. 86 (39 Am. Rep. 208); Roberts *v.* Ogle, 38 Ill. 459; Anderson *v.* Locke, 64 Miss. 283; Burdett *v.* Allen, 35 W. Va. 347; Coyle *v.* McNabb (Tex.), 18 S. W. 198; City of Paris *v.* Hale (Tex. Civ. App.), 35 S. W. 333; Armstrong *v.* Traylor, 87 Tex. 598; Sutton *v.* State, 96 Tenn. 696; Wilson *v.* Bayers, 5 Wash. St. 303; Stewart *v.* Hunter, 16 Oreg. 62 (16 P. 876*); Shehane *v.* Bailey, 110 Ala. 308.

[2] In re Linehan, 72 Cal. 114.

[3] Ex parte Hodges, 87 Cal. 162.

regulation of property in any other kind of domestic animals, and deserve special consideration. The right of property in a dog, although supposed at common law to be less valuable, and consequently less deserving of legal protection, has always been recognized. But in consequence of the tendency to be vicious, the dog's life has always been somewhat precarious. No one at common law has a right to kill a dog that is doing no harm, and has exhibited no vicious propensities, even though he may be trespassing upon another's land.[1] But not only may one kill any animal *damage feasant*, if it be necessary for the protection of life and property; [2] but also where a ferocious dog, addicted to biting mankind, is suffered to run at large unmuzzled, it is a common nuisance, and any person may kill it, independently of statute; and independently of the question whether it was doing or threatening mischief at the time of the killing, or whether the owner had notice of its disposition.[3] But no one has, independently of statute, a right to kill a fierce or dangerous dog, if it is kept on the owner's premises and not allowed to go at large.[4] The State may, however, by statute, provide for the killing of all vicious dogs, and even impose upon the owners the duty and burden of killing them.[5]

But the duties of the owners of dogs may be and are frequently changed by statute. The following lengthy quotation from an opinion of the Supreme Court of Massachusetts, gives an interesting account of the "dog" legislation in that State, and will serve as an index of

[1] Brent *v.* Kimball, 60 Ill. 21 (14 Am. Rep. 35); Matthew *v.* Fiestel, 3 E. D. Smith, 90; Dodson *v.* Moch, 4 Dev. & B. L. 146.

[2] Aldrich *v.* Wright, 53 N. H. 398.

[3] Putnam *v.* Payne, 13 Johns. 312; Maxwell *v.* Palmerton, 21 Wend. 407; Dunlap *v.* Synder, 17 Barb. 561; People *v.* Board of Police, 15 Abb. Pr. 167; Brown *v.* Carpenter, 26 Vt. 638; Woolf *v.* Chalker, 31 Conn. 121.

[4] Perry *v.* Phipps, 10 Ired. L. 259.

[5] People *v.* Gillespie, 25 App. Div. 91 (48 N. Y. S. 882).

similar legislation in other States. It is given in full, because neighborly disputes over dogs are a frequent source of bad feeling and expensive litigation: —

"There is no kind of property over which the exercise of this power (of police regulation) is more frequent or necessary than that which is the subject of the present action. In regard to the ownership of live animals, the law has long made a distinction between dogs and cats and other domestic quadrupeds, growing out of the nature of the creatures and the purpose for which they are kept. Beasts which have been thoroughly tamed, and are used for burden or husbandry, or for food, such as horses, cattle and sheep, are as truly property of intrinsic value and entitled to the same protection as any kind of goods. But dogs and cats, even in a state of domestication, never wholly lose their wild nature and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and, therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have 'no absolute and valuable property' therein which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin, or a distress for rent, or which could make him responsible for the trespasses of his dog on the lands of other persons, as he would be for the trespasses of his cattle.[1] And dogs have always been held by the American courts to be entitled to less legal regard and

[1] Vin. Abr. Trespass Z; Replevin A; 2 Bla. Com. 193; 3 Bla. Com. 7; 4 Bla. Com. 234, 235; Milton *v.* Faudrye, Pop. 116; *s. c. nom.* Millen *v.* Fawer, Bendl. 171; Mason *v.* Keeling, 1 Ld. Raym. 668; *s. c.* 12 Mod. 336; Read *v.* Edwards, 17 C. B. (N. S.) 245; Regina *v.* Robinson, 8 Cox Crim. Cas. 115.

protection than more harmless and useful domestic animals.[1]

"The damages sought to be prevented by the dog laws of the commonwealth, as declared in the preambles to the earlier ones, are sudden assaults upon persons, worrying, wounding and killing of neat cattle, sheep and lambs, 'distressing evils from canine madness' and other injuries occasioned by dogs. These statutes, which have been the subject of repeated consideration and revision by the legislature, with a view of securing these objects, and of affording means for ascertaining the owners and making them liable for the mischievous acts of their dogs, have accordingly not only provided that any person might kill a dog assaulting him, or attacking cattle or sheep, out of its owner's inclosure; and that the owner should be responsible, in either single, double or treble damages, for mischief committed by his dog; but have also declared that it should be lawful to kill any dog, as to which the requirements of law had not been complied with under circumstances which have varied in successive statutes. At first it was only any dog 'found strolling out of the inclosure or immediate care of its owner,' after due notice to him that it was suspected of being dangerous or mischievous; then 'not having a collar and certified' to the assessor; and, by later statutes, 'any dog found going at large, not wearing a collar;' 'found and being without a collar;' 'being without a collar;' 'going at large, and not registered in the town clerk's office, or the tax on which had not been paid;' 'going at large and not licensed and collared;' or, finally, all dogs, not licensed and collared, as required by statute, 'whenever and wherever found.' For the last ten years the statutes have also declared it to be the duty of certain public officers to cause such dogs to be destroyed under the

[1] Putnam *v.* Payne, 13 Johns. 312; Brown *v.* Carpenter, 26 Vt. 638; Woolf *v.* Chalker, 31 Conn. 121.

circumstances pointed out; and have given a remedy against the town or county for any injury done by dogs to other domestic animals.

"These statutes have been administered by the courts according to the fair construction of their terms, and without a doubt of their constitutionality. Under the statute of 1812, chapter 146, which required the owner or keeper of any dog to put a collar about its neck, to be constantly worn, with the name and residence of the owner marked thereon, and declared it to be lawful to kill any dog 'found and being without a collar as aforesaid' (omitting the qualifications of other statutes, of 'going at large' or 'out of the immediate care of its owner'), it was held that no action could be maintained for killing a dog without such a collar, out of his owner's inclosure, although under his immediate care; Chief Justice Shaw saying: 'We think it was the intention of the legislature not to give the owner of a dog a right to maintain an action for destroying him, unless he had, in fact, given that security to the public which the act required.'[1] And a person who, instead of killing a dog being without a collar, converted him to his own use, was held liable to the owner in trover, because in the words of Chief Justice Shaw: 'The object of the statute is, not to confer a benefit on an individual, but to rid society of a nuisance by killing the dog.'[2] Similar statutes have been held in other States to be reasonable and constitutional regulations of police.[3] The statute under which this defendant justifies provides that the mayor of cities and chairmen of selectmen of towns, shall within ten days from the first day of July, annually, 'issue a warrant to one or more police officers or constables, directing them to proceed forthwith either to kill or cause to be killed all dogs within their respective cities or towns, not licensed and collared

[1] Tower *v.* Tower, 18 Pick. 262.

[2] Cummings *v.* Perham, 1 Met. 555.

[3] Morey *v.* Brown, 42 N. H. 373; Carter *v.* Dow, 16 Wis. 298.

according to the provisions of this act, and to enter complaint against the owners or keepers thereof; and any person may, and every police officer and constable shall, kill or cause 'to be killed all such dogs, whenever and wherever found.'[1] The warrant here provided for, being general in its form, not founded on oath, nor containing any special designation of object, is not indeed a legal warrant of search and seizure; it is rather an appointment of the officer who is to be specially charged with the duty of executing the authority conferred by the statute. The statute makes it the duty of every police officer and constable to kill or cause to be killed, all dogs not licensed and collared according to its provisions, 'whenever and wherever found.' There are no express restrictions of time or place, and no limitation, as in earlier statutes, to dogs going at large, or out of the owner's inclosure or his immediate care. Any restrictions upon the authority of the officer arise by implication, from regard to the sanctity of the dwelling house or the danger of a breach of the peace. But it is unnecessary in the present cases very closely to consider the extent of such restrictions, if any, which are to be implied upon the power and duty of the officer to abate what the law has declared to be in substance and effect a public nuisance. The regulations imposed by the statute upon the ownership and keeping of dogs are reasonable and easy to be complied with. If any dog is an object of value or of affection to his owner he has only to procure and record a license and put on a collar, in order to bring it under the protection of the law.

"It is agreed that neither of the plaintiffs had complied with the statute in these respects, and there is nothing in the facts agreed in either of the cases from which it can be inferred that the defendant committed any trespass upon the plaintiff's premises, or any act tending to a breach of

[1] Statutes 1867, ch. 130, § 7.

the peace. Under the defendant's authority and duty to kill or cause to be killed all dogs not licensed and collared, 'whenever and wherever found,' he had clearly a right peaceably to enter for that purpose, without permission, upon the close of the owner or keeper of such a dog, and there kill it." [1]

Regulations of this general character are to be found in very many, if not most, of the States. The constitutionality of laws has been very generally sustained, which authorized the killing of all dogs without a collar.[2] And it has frequently been held lawful for the State, as an encouragement for the rearing of sheep, to discourage the keeping of dogs by the requirement of a license fee for each dog.[3] And conceding the right of the State to require a license fee for the keeping of a dog, which is intended to operate as a check upon the keeping of dogs, the amount of the license is not open to judicial revision. It cannot be confined by judicial intervention to the mere

[1] Blair *v.* Forehand, 100 Mass. 136 (1 Am. Rep. 94). See, also, Commonwealth *v.* Palmer, 134 Mass. 537.

[2] Morey *v.* Brown, 42 N. H. 373; Cranston *v.* Mayor of Augusta, 61 Ga. 572; Sentell *v.* New Orleans & C. Ry. Co., 166 U. S. 698; Jenkins *v.* Ballantyne, 8 Utah, 245; People *v.* Tighe, 9 Misc. Rep. 607 (30 N. Y. S. 368); Fox *v.* Mohawk & H. R. Humane Society (Hun), 46 N. Y. S. 232; Wilson *v.* Byers, 5 Wash. St. 303; City of Independence *v.* Trouvalle, 15 Kans. 70; City of Cherokee *v.* Fox, 34 Kans. 16; State *v.* City of Topeka, 36 Kans. 76; Woolf *v.* Chalker, 31 Conn. 121; King *v.* Kline, 6 Pa. St. 318; Mitchell *v.* Williams, 27 Ind. 62; State *v.* Cornwall, *Ib.* 120; Haller *v.* Sheridan, *Ib.* 494; Commonwealth *v.* Markham, 7 Bush, 486; Mowery *v.* Salisbury, 82 N. C. 175; Cole *v.* Hall, 103 Ill. 30; Holst *v.* Roe, 39 Ohio St. 340; Archer *v.* Baertschi, 8 Ohio C. C. 12; Van Horn *v.* People, 46 Mich. 183; Hendric *v.* Kalthoff, 48 Mich. 306; Tenney *v.* Lenz, 16 Wis. 589; Marshall *v.* Blackshire, 44 Iowa, 475; City of Carthage *v.* Rhodes, 101 Mo. 175. But see Lynn *v.* State, 33 Tex. Cr. Rep. 153, denying this power of the State. But this power cannot be delegated to a private humane society. Fox *v.* Mohawk & H. R. Humane Society, 48 N. Y. S. 625; 25 App. Div. 26.

[3] Mitchell *v.* Williams, 27 Ind. 62; Carter *v.* Dow, 16 Wis. 298; Tenney *v.* Lenz, 16 Wis. 566; State *v.* Cornwall, 27 Ind. 62; Holts *v.* Roe, S. C. Ohio, 5 Ohio Law J. 605.

expense of issuing the license. In order to operate as a restraint upon the keeping of dogs, the amount of the license must be large enough to make it burdensome to keep dogs, and, as has been fully explained in connection with the discussion of licenses in general,[1] the imposition of such licenses, as a restraint upon the doing of some thing which inflicts or threatens to inflict injury on the public, is free from all constitutional objections.[2]

In many of the States compensation is given by statute to the owners of the sheep killed by dogs, and a summary proceeding is usually provided for recovering damages from the owner of the dog. But in order to be constitutional, the act must provide for a judicial examination of the wrong done and the damage suffered, with a full opportunity for the owner of the dog to be heard. In New Hampshire a statute of this kind was declared to be unconstitutional so far as it undertook to bind the owner of the dog by the amount of damages, which had been fixed by the selectmen of the town without giving him an opportunity to be heard on the question of damages.[3] In Michigan a statute was sustained, which required the money, collected from

[1] See *ante*, § 119.

[2] "We cannot assent to the position taken by appellant, that if the sum required for a license exceeds the expense of issuing, the act transcends the licensing power and imposes a tax. By such a theory the police power would be shorn of all its efficiency. The exercise of that power is based upon the idea that the business licensed or kind of property regulated, is liable to work mischief, and therefore needs restraints, which shall operate as a protection to the public. For this purpose the license money is required to be paid. But if it could not exceed the mere expense of issuing the license, its object would fail altogether. * * * We have no doubt, therefore, that the legislature may, in regulating any matter that is a proper subject of police power, impose such sums for licenses as will operate as partial restrictions upon the business, or upon the keeping of particular kinds of property." Tenny *v.* Lenz, 16 Wis. 567.

[3] East Kingston *v.* Towle, 48 N. H. 57 (2 Am. Rep. 170). But see *contra*, supporting the constitutionality of such a law, Fairchild *v.* Rich, 68 Vt. 202.

the enforcement of the tax against dogs, to be kept as a fund for the reimbursement of sheep owners for the losses of sheep, which have been killed by dogs.[1]

§ 177. Laws for the prevention of cruelty to animals. — From a scientific standpoint, perhaps the most curious phase of the exercise of police power is embodied in the laws for the prevention of cruelty to animals. These laws now prevail very generally throughout the United States, and public sentiment is in most communities unusually active in its support, and is not restrained by any difficulty in finding a scientific justification for the law. The enactment and enforcement of the law are prompted by a tender sympathy for the dumb brutes, who while serving human ends are being subjected to cruelty. These statutes are designed, as the language of the statutes expressly indicates, for the prevention of cruelty to animals. Whose rights are protected by the enactment? Those of the animals? Are animals, other than human beings, recognized as the subjects of rights? Cruelty to animals might be claimed as an offense against public morality and the public sense of mercy. But that is in the nature of an afterthought, suggested as an escape from the logical dilemma, with which one is otherwise confronted in the consideration of these laws. Whatever may be said to the contrary, in the enactment of these laws, there is an unconscious, if not admitted, recognition of legal rights in the dumb animals, who are subjected to man's dominion. They are by such legislation placed in the same legal relation to the freeman as the slave was in the days of slavery. Both are the property of the freeman; the master's power of control was limited only by just such laws, as the one now under consideration, which were designed to prevent cruelty in their treatment. It is the torture to the animal that is prohib-

[1] Longyear *v.* Buch, 83 Mich. 236.

ited, wherever it was done.[1] If the law was considered and justified merely as the prohibition of an offense against the public sense of mercy, and involved no recognition of rights in the dumb animals, the operation of the law would have to be confined to public acts of cruelty, such as unmerciful beating on the streets and other thoroughfares. But it is plain that the ordinary law for the prevention of cruelty to animals is broken as much by cruel treatment in the stable as in the public highway; whether done in the presence of a large assembly, as in the cock-pit, or with no others present than the person whose anger or pure maliciousness induces the act of cruelty. The animals so protected must be recognized as subjects of legal rights. And why should they not be so recognized? Is it not self-conceit for man to claim that he alone, of all God's creatures, is the possessor of inalienable rights?

The powers of these societies for the prevention of cruelty to animals are not limited to the prevention, and the prosecution of persons guilty, of acts of cruelty towards the dumb animals. They are, likewise, authorized to apprehend disabled animals, and, if they are incurable, to destroy them in the most expeditious and the least painful manner. Here, as elsewhere, wherever public officers are authorized for various reasons to kill animals belonging to private individuals, the agent for the society for the prevention of cruelty to animals is authorized to kill hopelessly disabled animals, without the previous consent of, or notice to, the owner.[2]

The medical profession has frequently been assailed by these societies and by private individuals, for their practice of vivisection. Anti-vivisection societies have been formed in England and in this country for the purpose of

[1] See State *v.* Pugh, 15 Mo. 509.

[2] King *v.* Hayes (Me.), 13 A. 882.

securing laws for the prohibition of vivisection; so far, I believe, without success. The constitutional question, which would seem to be involved in such proposed prohibitory legislation, is not difficult to solve and answer. The criminal or immoral element in acts of cruelty, is not the infliction of pain, but the infliction of pain without just cause or excuse. When a steer is knocked in the head, and his throat cut, in order that he may be converted into beef for human consumption, pain is inflicted; but it is not a wrongful act of cruelty, either in the domain of law or of ethics; because the motive of the act, viz.: provision for the sustenance of a more valuable human life, being held by everyone, but vegetarians, to be both just and laudable, justifies the infliction of the pain and the taking of the animal's life. A butcher is not to be classified in this respect with the driver who in a fit of passion knocks his horse in the head, because it cannot draw the overload which has been put in the cart. According to prevalent public opinion, the butcher does praiseworthy, or at least, an unblameworthy act, when he knocks the steer on the head; while the driver deserves the condemnation of the community, and the punishment provided by law, when he inflicts the same pain upon his overloaded horse. The element, which differentiates the two cases, is the motive with which the blow has in the two cases been given.

The same principle of differentiation is applicable to, and should alone determine, the right or wrong of vivisection. The boy, who tortures a cat by tying a tin can to its tail, cannot be judged by the same norm, which determines or should determine the moral character of an original investigator who flays a live cat or rabbit, in the pursuit of scientific knowledge, which, when gained and thoroughly established by such investigations which can alone be pursued with the aid of vivisection, will promote the health and happiness of the human race. The boy ought to be spanked; the physician, praised and commended.

Regulation of the practice of vivisection is profoundly different from its prohibition. Laws, which permitted vivisection, wherever its practice tended to promote the welfare of the human race by the extension of medical and biological knowledge, and prevented and punished resort to the practice, whenever it was pursued by laymen for the gratification of a love of cruelty or an idle curiosity, would be absolutely free from constitutional objection; and would be in perfect harmony with the ordinary laws for the prevention of cruelty to animals.

§ 178. **Regulation of contracts and rights of action.** — The validity of an ordinary contract cannot be impaired by State legislation, for it is protected from such an attack by an express provision of the Federal constitution.[1] Any law, therefore, which changes the character of the obligation, either by diminishing or increasing its burden, is void because it impairs the obligation.[2] The obligation of the contract, which is thus protected from impairment, is civil and not moral; that is, the contract must be legal, according to the provisions of the law in force when the contract was made, in order that it may claim this protection. An illegal contract creates or supports no rights, in short has no legal existence.[3] It will not be necessary to explain in this place

[1] "No State shall pass any law impairing the obligation of a contract." U. S. Const., art. I, § 10.

[2] Douglass *v.* Pike Co., 101 U. S. 677; McCracken *v.* Hayward, 2 How. 608, 612; Ogden *v.* Saunders, 12 Wheat. 213; People *v.* Ingersoll, 58 N. Y. 1; Goggans *v.* Turnipseed, 1 S. C. 40 (7 Am. Rep. 23); Stein *v.* Mobile, 49 Ala. 362 (20 Am. Rep. 283); Van Baumback *v.* Bade, 9 Wis. 559. And the constitutional prohibition applies to changes in the State constitution as well as to amendments of the statutes. White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson, 13 Ark. 654; Oliver *v.* Memphis, etc., R. R. Co., 30 Ark. 128; Jacoway *v.* Denton, 25 Ark. 641.

[3] "It is the civil obligation which [the constitution] is designed to reach; that is, the obligation which is recognized by, and results from, the law of the State in which it is made. If, therefore, a contract when made is by the law of the place declared to be illegal, or deemed to be a

how far laws may be enacted for the regulation of subsequent contracts, for this matter has been fully discussed in another connection.[1] Nor is it necessary or appropriate to explain here in detail what is included under the term "contract," in the sense in which the word is used in the constitutional provision referred to.[2] The term contract is here employed in the sense of "executory contract," an agreement between two or more, for a valuable consideration, to do or give something.

This means that there must be words of positive contract, so that a clear and positive obligation has been made; and that obligation must have been supported by some valuable consideration. Thus, for example, if a statute, which in one section declares that the revenues of a city "shall" be devoted to the liquidation of obligations for current expenditures, provides in another section that the surplus revenues "may" be applied to the payment of indebtedness of former years; the latter provision, in which the permissive "may" was employed, did not create any binding obligation, which may not be impaired by a subsequent repeal of the statute.[3] And, in illustration of the necessity of a valuable and substantial consideration, in order that a contract may be protected by the constitutional provision against the impairment of the obligation of a contract, the following case may be consulted. It holds that the acceptance of a gratuitous trust does not constitute such a contract, as

nullity, or a *nude pact*, it has no civil obligation; because the law in such cases forbids its having any binding efficacy or force. It confers no legal right on the one party, and no corresponding legal duty on the other. There is no means allowed or recognized to enforce it; for the maxim is *ex nudo pacto non oritur actio*. But when it does not fall within the predicament of being either illegal or void, its obligatory force is co-extensive with its stipulations." Story on Constitution, § 1380.

[1] See *ante*, §§ 91, 99–118.

[2] For a discussion of this subject see Cooley Const. Lim., pp. 331-346. Whether the character of corporations fall properly within the meaning and scope of this provision, see *post*, § 188.

[3] United States ex rel. Siegel *v.* Thoman, 156 U. S. 353.

that it would in a constitutional sense be an impairment by a statute, subsequently enacted, which provided for the allowance to such a trustee of compensation.[1]

Two recent cases from the Supreme Court of the United States may be referred to in illustration of the retrospective and prospective operation of a statute, which is held to impair the obligation of a contract. In one case,[2] the facts were these: A Texas statute of 1854 made grants of land to certain railroads. Subsequently, the charter of a certain railroad was amended, so that the privileges of the act of 1854 may be accorded to it, provided the railroad in question was confined to a prescribed route. This road was sold under foreclosure of mortgage, and transferred to a new company, which had been incorporated to operate the road. By the act of July 27th, 1870, this new company was authorized to abandon the old route of the road and to construct a new roadbed. The Constitution of 1869, however, prohibited the grant of public lands to any railroad. It was held that the constitutional prohibition applied to the new road, and avoided any grant to it of public lands; while it did not affect any of its rights derived from the contract of the State with the old company. In a subsequent case[3] under a similar grant in 1866 of public lands to the railroad in question as a part of the charter contract, the railroad had not completed their entire authorized line, and had not acquired the title to all the land to which it was entitled under the land grant act, when the constitution of 1869 went into operation. The court held that the constitutional prohibition could not apply to that part of the land grants to that railroad which were still incomplete without impairing the charter contract. Any such application of the constitutional prohibition was void and of no effect.

[1] Arnold *v.* Alden, 173 Ill. 229.

[2] Galveston H. &. S. A. Ry. Co. *v.* State of Texas, 170 U. S. 226.

[3] Houston & T. C. Ry. Co. *v.* State of Texas, 170 U. S. 243.

The constitutional provision against impairing the obligation of contracts is held to be binding only upon the States. But there can be no doubt that similar action by Congress would likewise be unconstitutional, because it would deprive one of his property without due process of law.[1]

Very little difficulty is ever experienced in determining when and to what extent an enactment impairs the substantive rights of parties to an existing contract; and when such an impairment of the obligation of a contract comes within the constitutional inhibition. The rule is very plain that no impairment of the substantive rights under a contract is permissible by subsequent legislation. A few examples, drawn from recent adjudications, will amply illustrate this portion of the subject.

Where a city and a railroad enter into a contract that the expense of maintaining and repairing a viaduct shall be divided between them, with no limitation as to the amount of the aggregate expenditure for that purpose, the State, in the exercise of its ordinary police power, reserves to itself the power to determine the amount that must be expended in the maintenance and repair of the viaduct; and may increase the burden to the company far beyond the expectations of the company, without violating the constitutional provisions as to the inviolability of contracts.[2] So, also, inasmuch as the right of inheritance of property from a decedent rests absolutely upon a legislative fiat, and is not supported by any principle of absolute or natural right,[3] it has been held, and rightly held, that a statute, which provides for escheat, after personal notice to all known claimants, and notice by publication to all unknown claimants, is not unconstitutional as an impairment of the obligation of a contract.[4] The well-known

[1] See *ante*, § 96.

[2] Chicago B. & Q. Ry. Co. *v.* State (U. S.), 18 S. Ct. 531.

[3] As to which, see *ante*, § 137a.

[4] Hamilton *v.* Brown, 161 U. S. 256.

case of the Charles River Bridge *v.* Warren River Bridge,[1] may likewise be cited in this connection. In that case, the facts were these: The Charles River Bridge Company had been authorized to establish a bridge across the Charles river, and to charge toll for its use by the public. Subsequently the legislature of Massachusetts authorized the construction of a second and parallel bridge, known as the Warren River Bridge. The construction of the second bridge impaired the value of the first bridge franchise by the serious diminution of its profits, and ultimately destroyed its value; inasmuch as the second bridge was to be opened to the public free of charge, some time before the expiration of the franchise of the earlier bridge. The Supreme Court of the United States held that the charter rights of the Charles River Bridge Company had not been impaired in the constitutional sense by the grant of franchise to a competing bridge company; on the ground, that no grant of a public franchise, like that of a bridge, will be presumed to be an exclusive monopoly, in the absence of an express legislative declaration to that effect; and that the incidental injury, proceeding from the grant of a second competing franchise, does not constitute an impairment of the obligation of the charter contract with the earlier bridge company.

But contracts with public corporations, like a city or county, no less than contracts with private parties, are protected by the constitutional inhibition of laws impairing the obligation of contracts. For example, laws which impose upon cities and towns a limitation of their power to contract debts, or which direct the observance of certain requirements in order to incur a legal liability, can never have a retrospective effect, so as to affect the validity of antecedent debts which have been incurred in full compliance with the then existing law. Thus, a constitutional

[1] 11 Pet. 420, 536.

provision, which limits the lawful indebtedness of a city or town to ten per cent of the assessed valuation of the real estate within its limits, cannot be applied, so as to invalidate contracts with the city or town which were made prior to the adoption of this constitutional provision. The fact, that it was a constitutional amendment instead of an ordinary statutory enactment, made it no less an unlawful violation of contractual rights.[1] And so, likewise, a law is unconstitutional which requires that a vote of the taxpayers shall determine whether the debts of an old municipal corporation shall be assumed by its successor, which is provided for by a general reincorporation of cities and towns. Such a law impairs the obligation of an existent contract which would be enforced against the succeeding municipality, without any vote or other approval or assumption of the debt.[2] On the other hand, it has been held that where an existent county is divided into two new counties, there is no impairment of the obligation of contract, if the existing county debt is proportionally divided between the two new counties.[3]

Where a city enters into an agreement with a contractor for the construction of sewers in certain named streets the contract cannot be subsequently annulled by ordinances, even though the ordinance of abrogation be passed before any of the work be done.[4] So, also, is it unconstitutional to make the repeal of an existing law, under which claims for damages to property arising from the opening of new streets were to be adjusted, apply to pending suits which have been carried so far to completion as to have secured

[1] Sheehan *v.* Treasurer of Long Island City, 33 N. Y. S. 428; 11 Misc. 487. See, also, to the same general effect, In re Copenhaver, 54 Fed. 660.

[2] Shapleigh *v.* City of San Angelo, 167 U. S. 646.

[3] Savings & Loan Ass'n *v.* Altmas Co., 65 Fed. 677; Mills County *v.* Brown County (Tex.), 29 S. W. 650.

[4] Stevens *v.* City of Muskegon, 111 Mich. 72.

an appraisal and judicial approval of it.[1] So, also, is it not permissible to change by subsequent legislation the order previously prescribed, in which warrants should be paid by the city treasurer out of the funds of the city. Such a statutory change would constitute an unlawful impairment of the obligation of the contract of the city, which is evidenced by the warrant.[2]

Contracts, creating liabilities on the part of private individuals to public or municipal corporations, are equally protected from impairment by subsequent legislation. A State law, which releases a State officer and his sureties on his official bond from liability to a township, is unconstitutional and void.[3]

Another important phase of the protection of contracts from impairment by subsequent legislation, is found in the application of the constitutional principle to the effect of judicial construction of the validity of a contract. It has thus been held that, where a State Supreme Court has declared a statute to be valid, which determined the validity of certain series of contracts, and parties have entered into these contracts in reliance upon the decision, so rendered in favor of their validity, there would be an unconstitutional impairment of the obligation of a contract for the court to reverse its decision in respect to the validity of the statute, and in consequence to declare invalid any contract of the series, which they had sustained in their earlier decision. But the rule of *stare decisis* would not thus control the decision of the court in respect to the validity of another similar but different statute.[4] But it is only the

[1] People *v.* Common Council of Buffalo, 140 N. Y. 300.

[2] Eidemiller *v.* City of Tacoma, 14 Wash. St. 376 (44 P. 877).

[3] McClellan *v.* State, 138 Ind. 321.

[4] Wood *v.* Brady, 150 U. S. 18. This principle has been applied by the United States Supreme Court and in other cases, in favor of the holders of municipal bonds, who have relied upon the judicial determination of the validity of a statute, under which bonds of like character have been issued by the different municipalities.

decision of the court of last resort of a State, which will have the effect of estopping the State from subsequently questioning the validity of bonds and other contracts, which have been made, in reliance upon the decision. The favorable decision of a *nisi prius*, or of an intermediate appellate court, will not have the effect of making the contracts and debts secure against a reversal of the judgment in a subsequent case.[1]

Inasmuch as the law prohibits the individual from redressing his own wrong, he is entitled to an appropriate action in the law courts of the country. A denial of this right of action would be as much an interference with the right that has been violated, as the original trespass was. If the violated right is a broken contract, an absolute refusal of all remedy would impair the obligation of a contract in a constitutional sense, and the law taking away all remedies would be void.[2] For a like reason, a law, which would take away all remedies for the violations of other rights, whether of persons or of property, would appear to violate the legal sanctity of the substantive right. If it be a right of property that has been transgressed, the deprivation of the right of action would be an interference with vested rights; and so also would it be an infringement of one's personal security, if a right of action was denied for a trespass upon one's person or liberty. But it has been held by the United States Supreme Court that a constitutional convention of a State may take away existing rights of action, provided the obligation of a contract is not impaired, or a punishment inflicted.[3] There is certainly no

[1] Bacon *v.* State of Texas, 163 U. S. 207. See, also, Gelpcke *v.* Dubuque, 1 Wall. 200; Railroad Co. *v.* McClure, 10 Wall. 511.

[2] Osborne *v.* Nicholson, 13 Wall. 662; Call *v.* Hagger, 8 Mass. 430; Penrose *v.* Erie Canal Co., 56 Pa. St. 46; Thompson *v.* Commonwealth, 81 Pa. St. 314; West *v.* Sansom, 44 Ga. 295; Rison *v.* Farr, 24 Ark. 161; Griffin *v.* Wilcox, 21 Ind. 370; McFarland *v.* Butler, 8 Minn. 116; Jackson *v.* Butler, 8 Minn. 117.

[3] Drehman *v.* Stifel, 41 Mo. 184; *s. c.* 8 Wall. 595. See Hess *v.* John-

express provision of the constitution which protects these rights of action from interference by legislation; but it would seem to us that the constitution protects from undue interference the right to resort to the courts for redress of one's wrongs, as much as it does the right to pursue a harmless occupation. They are equally essential to the pursuit of happiness. It would be an act of tyranny for a government to deny the right to redress one's own wrongs, and at the same time to refuse an appropriate remedy. It is probable that the Supreme Court would have decided differently, if the constitutional provision under consideration had had reference to other rights of action than those growing out of the conflict of war.

The cases are very few in which even an apparent denial of all remedy would be permitted to apply to existing contracts. Where, however, no right to a remedy can be claimed, independently of an express statutory authorization, as in the case of a claim against a State government, it has been held by the Supreme Court of the United States that a law, repealing a statute which provided for the adjudication and auditing by the courts of claims against the State, did not constitute, when applied to existing claims, any constitutional impairment of the obligation of the contract. And, even when this conclusion has been reached by the State courts, through an erroneous construction of the operation of the supposedly repealing statute, the Federal courts will not interfere to correct the error.[1]

On the other hand, it has been held that there is no violation of the vested rights of a defendant, if a statute, providing for the survival of causes of action for personal injuries, which otherwise abated at the death of the

son, 3 W. Va. 645. In the first case, the constitutional provision took away all rights of action for anything done by the State or Federal military authorities during the Civil War.

[1] Baltzer *v.* State of North Carolina, 161 U. S. 240.

plaintiff, is made to apply to all existing causes of action of that kind, whether suit has been or may hereafter be brought.[1]

The right of appeal to a higher court is never considered so essential a part of the remedy that it may not be granted, taken away or enlarged, without impairing the substantial rights of parties to a contract. These changes in the right of appeal may be made at the discretion of the legislature. The citizen has no vested right in an existing right of appeal.[2] It is also permissible for a legislature, without impairing the obligation of a contract, to grant the right of appeal to cases which involve a given amount in value and over, and to deny the right in cases, in which the amount involved falls below the stated limit.[3] On the other hand, there is no impairment of the obligation of a contract, if a statute, granting the right of appeal where none existed, or extending an existing right of appeal, is made to apply to an existing contract or cause of action.[4]

As long as a substantial remedy is provided, the character of it may be changed at the pleasure of the legislature; and when it applies to the enforcement of a contract, such a change, however material, will not be considered to impair the obligation of a contract, even though the change is to a less desirable or convenient remedy.[5] The most radical

[1] Houston & T. C. Ry. Co. *v.* Rogers (Tex. Civ. App.), 39 S. W. 1112.

[2] North Point Consol. Irrigation Co. *v.* Utah & Salt Lake Canal Co. (Utah), 46 P. 824; Eastman *v.* Gurrey (Utah), 46 P. 828.

[3] Chicago B. & Q. Ry. Co. *v.* Headrick, 49 Neb. 286; 68 N. W. 489.

[4] Lovell *v.* Davis, 52 Mo. App. 342.

[5] Ogden *v.* Saunders, 12 Wheat. 213; Beers *v.* Haughton, 9 Pet. 329; Tennessee *v.* Sneed, 96 U. S. 69; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747; Willis *v.* Miller, 29 Fed. 238; Strickler *v.* Yager, *ib.*; Commonwealth *v.* Jones, 1 S. E. 84, note; 82 Va. 789; Simpson *v.* Savings Bank, 56 N. H. 466; Danks *v.* Quackenbush, 1 N. Y. 129; Morse *v.* Goold, 11 N. Y. 281; Baldwin *v.* Newark, 38 N. J. 158; Moore *v.* State, 43 N. J. 203; Evans *v.* Montgomery, 4 Watts & S. 218; Penrose *v.* Erie Canal Co., 56 Pa. St. 46; Baumgardner *v.* Circuit Court, 4 Mo. 50; Por-

changes are permissible, as long as a substantial remedy remains. It is not considered to be a right, privilege or immunity of citizen, guaranteed either by the national or State constitution, to employ any particular form of action in the prosecution of a claim.[1] It is fully within the competency of the legislature to prescribe the form of complaint, as well as the form of action.[2] And this is true, even though the new remedy or form of action may be more summary and expeditious.[3] The only limitation on the power of the legislature to change the remedies or forms of procedure, and to apply the new remedy or form of procedure to existing causes of actions, is that the change must not work any denial to the reasonable enforcement of any substantive rights of the parties litigant.[4]

A law may take away from existing contracts the right to confine the debtor, and yet not impair the obligation of the contract. "Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair the obligation." [5] In the same way, an altogether

ter *v.* Mariner, 50 Mo. 364; Smith *v.* Van Gilder, 26 Ark. 521; Coosa River St. B. Co. *v.* Barclay, 30 Ala. 120; Holloway *v.* Sherman, 12 Iowa, 282; Smith *v.* Packard, 12 Wis. 371; Bronson *v.* Newberry, 2 Dougl. (Mich.), 38; Brockwell *v.* Hubbell's Admrs., 2 Dougl. (Mich.) 197.

[1] Iowa Cent. Ry. Co. *v.* State of Iowa, 160 U. S. 389.

[2] State *v.* McCaffrey (Vt.), 37 A. 234.

[3] New Orleans C. & L. Ry. *v.* State of La., 157 U. S. 219.

[4] Maury *v.* Commonwealth, 92 Va. 310.

[5] Marshall, C. J., in Sturges *v.* Crowninshield, 4 Wheat. 122. See Mason *v.* Haile, 12 Wheat. 370; Penniman's Case, 103 U. S. 714; Matter of Nichols, 8 R. I. 50; Sommers *v.* Johnson, 4 Vt. 278 (24 Am. Dec. 604); Ware *v.* Miller, 9 S. C. 13; Maxey *v.* Loyal, 38 Ga. 531; Bronson *v.* Newberry, 2 Dougl. (Mich.) 38; In re Knaup, 144 Mo. 653; Colby *v.* Backus, 19 Wash. St. 347. A judgment lien may be taken away by the repeal of the statute authorizing it. Watson *v.* N. Y. Cent. R. R. Co., 47 N. Y.

different remedy may be provided without taking away any existing remedy; as, for example, where a statute imposed a penalty on a lessee for continuing in possession after the termination of the lease; its application to existing leases was held not to constitute an unlawful impairment of the obligation of a contract.[1]

So, also, has it been held that it constitutes no impairment of the obligation of a contract, in a place where a party has contracted to furnish water to a city, if a subsequent statute makes the violation of these contractual obligation a criminal misdemeanor. By entry into these obligations to furnish water, the party has assumed a public duty, the violation or non-performance of which merits the severest punishment.[2]

Changing the locus of the suit for ejectment does not violate any constitutional provision; as where a new law authorizes a suit in ejectment to be brought in a

157; Woodbury *v.* Grimes, 1 Col. 100. But see, *contra,* Gunn *v.* Barry, 15 Wall. 610. The time of the lien may also be extended before it has expired (Ellis *v.* Jones, 51 Mo. 180), or the mode of securing it changed before it has attached. Whitehead *v.* Latham, 83 N. C. 232. See, also, Williams *v.* Haines, 27 Iowa, 251, in which a statute, which allowed the want of consideration to be set up in defense of an action on a sealed instrument, was held to be constitutional, because it did not impair the obligation of the contract. On the other hand, where by statute the stockholders are made personally liable for the contracts of the corporation, a statute taking away this liability cannot be made to apply to existing contracts. Hawthorn *v.* Calef, 2 Wall. 10; Corning *v.* McCullough, 1 N. Y. 47; Story *v.* Firman, 25 N. Y. 214; Morris *v.* Wrenshall, 34 Md. 494; Brown *v.* Hitchcock, 36 Ohio St. 667; Providence Savings Institute *v.* Skating Rink, 52 Mo. 452. So, also, may the distress for rent be taken away from existing leases. Van Rensselaer *v.* Snider, 9 Barb. 302; *s. c.* 13 N. Y. 299; Guild *v.* Rogers, 8 Barb. 502. And the distress for rent may be abolished, even in cases in which the parties have expressly stipulated for it. Conkey *v.* Hart, 14 N. Y. 22.

[1] Woodward *v.* Winehill, 14 Wash. 394.

[2] Crosby *v.* City of Council of Montgomery, 108 Ala. 498. It may be open to question, whether such an increase in the severity of the remedy, would be sustained, if applied to existing causes of action arising between strictly private parties.

county, other than that in which the land concerned lies. It is said that there is no vested right in the defendant to have the case tried in the county where the land is situated, or by a jury of that county.[1]

As long as the changes in the forms and rules of procedure do not interfere with the reasonable enforcement of the substantive rights of the parties, it cannot be said that the application of the new forms, or the new rules, to existing contracts and causes of action, constitutes an impairment of the obligation of a contract.

The service of process, on all persons whose rights and interests will be affected by a decree, is a fundamental requirement of justice. Any gross or plain violation of this fundamental requirement would certainly be in violation of the spirit, as well as of the letter, of the constitution, as it has been held in a number of cases. And, in ordinary cases, i. e., in the case of persons who live within the reach of the process of the court, nothing but personal service would answer the requirement of the constitutions. Service by publication or posted notice, in the case of residents of the State, in which the court has jurisdiction, could not be authorized by statute. Such a statute would be unconstitutional, because it would constitute an unlawful impairment of the obligation of a contract.[2] Thus, the Ohio registration land act of 1896, was held to be unconstitutional, because it provided for service by publication on all persons, interested in the title to a tract of land, who resided outside of the county.[3]

But where persons, who are interested in the subject-matter of the suit, reside beyond the jurisdiction of the court, personal service is impossible; and if no substitute were permitted, there would be a frustration of justice in

[1] State *v.* Lake Shore & M. S. Ry. Co., 1 Ohio N. P. 292; 2 Ohio Dec. 300.

[2] McNamara *v.* Casserly, 61 Minn. 335.

[3] State *v.* Guilbert, 56 Ohio St. 575.

many cases, unless the statute dispensed altogether with the service of notice on non-residents, and allowed judgment to be entered up, without notice of any kind, which would be binding upon the non-resident parties. Service by publication and by mail is provided as a substitutive process in such cases, i. e., in the case of non-residents, the additional service by mail being required in every case where the address of the non-resident party is known. The substitutive service of process by publication, in the case of non-residents, has been uniformly declared to be constitutional; at least, where there is property within the jurisdiction of the courts, against which a successive levy might be made in the enforcement of the judgment of the court.[1] But it is not denied that service by publication is insufficient in other cases. It is an universal, and, so far as I know, an unquestioned rule, that service by publication against a non-resident will give a court full jurisdiction to render a decree of divorce, where the party plaintiff is a *bona fide* resident of the State.[2] It has been held in New Jersey, that service by publication is sufficient to fasten a personal judgment upon a non-resident, in a suit in which he is jointly liable with one or more residents.[3]

But every one, who may be interested in the results of an action, need not be served with process, if he is legally represented by those who have been served. Thus, where suits for the enforcement of claims against a decedent are brought against executors or administrators, it is

[1] See City of Philadelphia *v.* Jenkins, 162 Pa. St. 451, in which the question was raised and answered in application to the service by publication of non-resident land-owners in actions for the enforcement of municipal liens. And see Kurtz *v.* Duluth Land Co., 52 Minn. 140, as to service by publication on non-resident infants of notice of appointment of a resident guardian. See also Kurtz *v.* St. Paul & D. R. Railroad Co., 48 Minn. 339.

[2] I do not, of course, refer to or include here the numerous cases of fraudulent acquisition of domicile, which the statutes of some of the States allow, in the interests of the local bar.

[3] Kirkpatrick *v.* Post, 53 N. J. Eq. 591.

not necessary that the widow and heirs of the deceased should be made parties, even though the suit be for the foreclosure of a mortgage on the so-called community property; i. e., property which had been owned jointly by the husband and wife, during the life of both.[1]

It is not an uncommon statutory provision, that in certain cases the plaintiff shall give security for costs, as a condition precedent to the maintenance of the suit. This requirement is held to be constitutional, and not to constitute a denial of justice.[2] It has also been held to be constitutional to tax the costs of a criminal prosecution upon the prosecuting witness, if it should prove to be a case of malicious prosecution, and to commit him to jail, until he pays them.[3]

In the State of Washington, a statute was held to be unconstitutional as class legislation, which provided that the plaintiff shall recover attorney's fees in all actions for injury to stock by railroad companies; no general provision being made for the recovery of attorney's fees in other and similar actions.[4] But the contrary opinion was reached by the Supreme Court of Illinois in a case in which the statute provided for the payment of a reasonable attorney's fee to the successful plaintiff in all suits by servants for the recovery of wages, which have been brought only after a previous demand in writing for payment. The statute was held to escape the constitutional condemnation of class legislation.[5]

The statutes, which provide for the claim and enforcement of mechanics' liens, in favor of workmen, who have expended labor upon the property, and of the material

[1] Hearfield *v.* Bridge, 67 Fed. 333.

[2] Succession of Grover, 49 La. 1050; Holt *v.* Tennallytown &c. Ry. Co., 81 Md. 219.

[3] Lowe *v.* State of Kansas, 163 U. S. 81.

[4] Joliffe *v.* Brown, 14 Wash. St. 155 (44 P. 149).

[5] Vogel *v.* Pekoc, 157 Ills. 339.

men, who have furnished supplies, furnish a number of opportunities for raising constitutional questions. Where the property is owned by the person who has employed the workman, or who has ordered the materials which have been used in the repair or improvement of the property, and the title to the property is in such a person, free and clear of all other liens and mortgages; the case is a very simple one, and furnishes little or no opportunity for doubt of its constitutionality. On the other hand, the grant of such a lien involves the creation of so vested an interest as that the repeal of the statute authorizing it will not, and cannot, affect the life and vigor of a lien which has been acquired under the statute prior to its repeal.[1] But where the property, against which the lien is lodged, does not belong to the person who contracted for the supplies or labor, or where it is already subjected to other adverse claims or liens, the conflicts of rights become more imminent, and constitutional questions more likely. Thus, most of the mechanics' lien laws authorize the filing of liens for labor and materials against property upon which they have been expended, where an independent contractor stands between the property owner and the laborers and material men, and with whom all the contracts have been made. The cases are unanimous that the provision for such a lien in such cases is not an unconstitutional interference with contract or vested rights, where the statute is not given a retroactive effect, in order to apply to contracts which are made prior to the enactment of the lien law.[2] And it does not offend the constitutions, if the statute requires the contractor to give the property owner a bond of indemnity, upon which recovery might be had on motion for any judgment which might have been obtained against the property owner in the enforcement of me-

[1] Garneau *v.* Port Blakely Mill Co., 8 Wash. 467.

[2] Henry & Coatsworth Co. *v.* Evans, 97 Mo. 47; Lambert *v.* Davis, 116 Cal. 292; Hoffa *v.* Person, 1 Pa. Super. Ct. 357.

chanics' liens, provided the contractor be given an opportunity to contest the claim.[1] In the Missouri case[2] it was held that the law was not unconstitutional, although the lien was granted to laborers and material men, irrespective of the condition of the account between the contractor and the property-owner, or the amount of the lien in relation to the sum due to the contractor. But the United States Circuit Court, in one case, held that both facts should be considered in the enforcement of the lien, so that the property should not in any event be thus subjected in the aggregate to any amount larger than the contract price of the improvements; and that where payments have been made to the contractor before the filing of the lien, that amount should be deducted from the contract price, in order to determine the amount for which the property can be held liable in the enforcement of such liens. The court held a lien law to be an unconstitutional interference with contract rights, which disregarded these principles.[3]

Still, it must be admitted that the position taken by the Missouri court is generally supported by the other State courts, except that it has been held to be unconstitutional to grant liens to workmen and subcontractors on contracts, which have been made prior to the enactment of the lien law.[4] It has thus been held to be permissible to enforce a lien in favor of laborers, without giving the property owner any notice whatever of the claim for wages against the contractor; the only effect of the want of notice being that a judgment against the contractor will not be conclusive against the property owner as to the amount of the claim.[5] On the other hand, the

[1] Cole Mfg. Co. *v.* Falls, 90 Tenn. 466.
[2] Henry & Coatsworth Co. *v.* Evans, 97 Mo. 47.
[3] Jones *v.* Great Southern Fireproof Hotel Co., 70 Fed. 477.
[4] Andrews & Johnson Co. *v.* Atwood, 167 Ill. 249.
[5] Brown *v.* Markham, 60 Minn. 233.

requirement of notice is so favored as that a statute, amending the existing lien law, which requires notice to be given to the property owner, may be given a retroactive effect, to apply to contracts which are made, but unperformed, prior to the enactment of the amendatory statute.[1] A statute of Alabama was held to be unconstitutional, as a taking of private property, which provided that, where the property owner had not notified a material man not to furnish supplies to the contractor, the failure to give such notice in writing would be *prima facie* evidence that the materials had been ordered by and with the consent of the owner.[2]

Another occasion for conflict of rights and the raising of constitutional questions, in the imposition of mechanics' liens, arises when the property is already subjected to some other lien or mortgage; and the attempt is made under the law to give priority to the mechanics' lien over the existing liens and mortgages. In Minnesota, it has been held that the mechanics' lien law was unconstitutional, as an interference with vested rights, in so far as it gave priority over such earlier liens and mortgages to the later mechanics' lien.[3] But other cases from the far western States maintain that the provision for such priority of the mechanics' lien does not impair the obligation of a contract or interfere with vested rights, in the constitutional sense; and they hold that the lien law is not unconstitutional for that reason.[4] In Missouri, a statute was declared to be constitutional, which provided that the debts of an insolvent, which were contracted for labor, should have preference over other debts, by complying with certain requirements of the statute.[5] The position of these latter courts seems

[1] Osborn *v.* Johnson Wall Paper Co., 99 Ala. 309.

[2] Randolph *v.* Builders' and Painters' Supply Co., 106 Ala. 501.

[3] Meyer *v.* Berlandi, 39 Minn. 438.

[4] Gaar *v.* Clements, 4 N. D. 559; Sitton *v.* Dubois, 14 Wash. 624 (45 P. 303).

[5] Hennig *v.* Staed, 138 Mo. 430.

to me to be sound. Inasmuch as all artificial values are the product of the combination of labor and materials, it is natural to presume that when labor or materials have been expended upon a piece of mortgaged property, the value of the security has been enhanced to the value of the labor, or of the materials, or of both, which have been expended upon the property. Where the debtor has not paid for this labor or for these materials, the prior mortgagee or lienholder has not, in theory at least, suffered any damage by the grant of a prior lien to the laborer or material man; for, after deducting the wages and cost of material from the present value of the improved property, the remaining value of the property is exactly what the whole value would have been, had not the improvements or repairs been made.

Where mechanic's liens are imposed upon property by statute, they would be of little value, if provision was not made for enforcing them against the property, after a sale of the land. These statutes usually require that the claims should be proven and filed, so that a subsequent purchaser will have notice of the existence of the liens and of the claims which support them. It would seem at least unjust, if not unconstitutional, to enforce mechanic's liens against *bona fide* purchasers of the property, if no provision is made for filing them in a public office, whereby an investigation may reveal their existence to the purchaser. The absence of such provision would make every purchaser of property take it at his peril. It has, however, been held in the State of Washington, that a law was constitutional, which declared it a conclusive presumption that a purchaser of property was not a *bona fide* purchaser, if he should fail to see to the settlement of any claims for wages for which liens upon the property, in accordance with the statute, may be filed within thirty days after the purchase and transfer of the property. The lien law in that State gave claimants thirty days, in which to file their claims for securing the lien of the property; when under this provision of

the statute, the lien would date back to the day of contract, and take priority over the title of a subsequent purchaser for value. The practical effect of the statute was to suspend the settlement of all contracts for the sale of property, for thirty days, in order to protect the purchaser against liens which may be subsequently filed against the property. The court held the law to be constitutional.[1]

In connection with the enforcement of mechanics' liens, the Alabama statute provided that the lien should cover a reasonable attorney's fee. But the Supreme Court of the State held this provision to be in conflict with the State constitution.[2] A contrary opinion was reached in a similar case in Montana.[3]

Somewhat similar to the imposition of attorney's fees for non-fulfillment of contracts is the provision of a penalty for non-performance of a contract or of a contractual or other obligation. And yet it is different. If the sum recovered under such circumstances be an approximate compensation for the damages which have been suffered on account of the breach of the contract or the non-performance of some legal duty, it is only a reasonable provision for indemnity against loss. But if the sum recovered bears no relation to the damage suffered, then it is in the strict sense of the term a penalty and punitory in character, which it would seem that the parties could not provide for justly by an express stipulation in the contract. For, so opposed was and is equity to the enforcement of a stipulated penalty, that it will furnish relief from the enforcement of such a penalty in every case, in which the actual damage suffered can be computed with reasonable accuracy. Thus a statute, which provided as a penalty, for the non-payment of an insurance policy within the time prescribed

[1] McCoy *v.* Cook, 13 Wash. St. 158; 42 P. 546.

[2] Randolph *v.* Builders' & Painters' Supply Co., 106 Ala. 501.

[3] Wortman *v.* Kleinschmidt, 12 Mont. 316; Helena Steam Heating & Supply Co. *v.* Wells, 16 Mont. 65 (40 P. 78).

in the policy, twelve per cent of the amount recoverable on the policy, in addition to attorney's fees, was held to be unconstitutional.[1] On the other hand, a statute was sustained in Nebraska, which provided for the recovery of a penalty, if the mortgagee refused to discharge a chattel mortgage which had been paid.[2]

The rules of evidence may also be changed without affecting the substantive rights involved. No one can be said to possess "a right to have one's controversies determined by existing rules of evidence."[3] These rules are always subject to change and modification by the legislature; and a new rule can be made to apply to existing rights of action, without interfering with vested rights, or impairing the obligation of a contract. Thus, a law could apply to existing rights of action, which permitted parties in interest to testify.[4] So, also, is it constitutional for a statute to deny the admissibility as evidence of the application for life insurance, where the application and its contents have not been made a part of the policy by actual attachment thereto of a copy of the original.[5] In the same way may a statute apply to existing rights of action, which changed the burden of proof from the plaintiff to defendant; as, for example, where a tax title is made by statute *prima facie* evidence of a compliance with the regulations for the sale of land.[6]

[1] New York Life Ins. Co. *v.* Smith (Tex. Civ. App.), 41 S. W. 680.

[2] Clearwater Bank *v.* Kurkouski, 45 Neb. 1.

[3] Cooley Const. Lim. 452. See Com. *v.* Weller, 82 Va. 721; State *v.* Weston, 1 Ohio N. P. 350; 3 Ohio Dec. 15.

[4] Rich *v.* Flanders, 39 N. H. 304; Southwick *v.* Southwick, 49 N. Y. 510. So, also, a statute which admits parol evidence to contradict a written instrument. Gibbs *v.* Gale, 7 Md. 76. See, generally, Ogden *v.* Saunders, 12 Wheat. 213; Webb *v.* Den, 17 How. 576; Fales *v.* Wadsworth, 23 Me. 553; Pratt *v.* Jones, 25 Vt. 303; Neass *v.* Mercer, 15 Barb. 318; Howard *v.* Moot, 64 N. Y. 262; Commonwealth *v.* Williams, 6 Gray, 1; Karney *v.* Paisley, 13 Iowa, 89.

[5] Considine *v.* Metropolitan Life Ins. Co., 165 Mass. 462; Dangan *v.* Metropolitan Life Ins. Co., 165 Mass. 462.

[6] Hand *v.* Ballou, 12 N. Y. 541; Forbes *v.* Halsey, 26 N. Y. 53;

On the same grounds it has been held to be constitutional for a law to provide that the failure of a bank, within thirty days from the time that a deposit has been received, shall be *prima facie* evidence of knowledge of insolvency at the time when the deposit was made.[1] On the other hand, a law of Alabama was held to be unconstitutional, which by creating a *prima facie* presumption, threw the burden of proof upon the property owner, that he did not order or assent to the order of labor or materials which had been expended on his property by a contractor, in every case in which he had not in writing notified the parties dealing with the contractor of the want of authority.[2]

But a statute cannot preclude the right to a judicial examination into the facts of a case, by making a certain set of circumstances conclusive evidence of the existence of the right of the plaintiff to recover or to be nonsuited. Except in the case of estoppel, where a man is denied the right to question the truth of his representations which he has made falsely to another's hurt, there can be no prejudgment of one's rights by the creation of conclusive presumptions.[3] For this reason, a tax deed cannot be

Lacey *v.* Davis, 4 Mich. 140; Wright *v.* Dunham, 13 Mich. 414; Delaplaine *v.* Cook, 7 Wis. 44; Lumsden *v.* Cross, 10 Wis. 282; Adams *v.* Beale, 19 Iowa, 61; Abbott *v.* Lindenbower, 42 Mo. 162; *s. c.* 46 Mo. 291.

[1] Robertson *v.* People, 20 Colo. 279.

[2] Randolph *v.* Builders' & Painters' Supply Co., 106 Ala. 501.

[3] Tift *v.* Griffin, 5 Ga. 185; Little Rock, etc., R. R. Co. *v.* Payne, 33 Ark. 816 (34 Am. Rep. 55); Abbott *v.* Lindenbower, 42 Mo. 162; *s. c.* 46 Mo. 291; Young *v.* Beardsley, 11 Paige, 93; East Kingston *v.* Towle, 48 N. H. 57 (2 Am. Rep. 174); Allen *v.* Armstrong, 16 Iowa, 508; Conway *v.* Cable, 37 Ill. 82; White *v.* Flynn, 23 Ind. 46; Groesbeck *v.* Seeley, 13 Mich. 329; Lenz *v.* Charlton, 23 Wis. 478; Taylor *v.* Miles, 5 Kan. 498 (7 Am. Rep. 558); Wright *v.* Cradlebaugh, 3 Nev. 341. In the case last cited the court say: "We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a good defense to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of the right of

made conclusive evidence of facts, such as compliance with the statutory requirements for the advertisement of the property or the making of proper parties, and the like. The deed may be declared to be *prima facie* evidence, but not conclusive, without violating constitutional principles.[1]

In the illustration of the operation of statutory estoppels, reference may be made to a Missouri statute, which provided that in suits on fire policies, thereafter issued or renewed, the insurance company would not be permitted to deny that the property was worth the amount of the policy, at the time that it was issued. The deed was declared to be constitutional.[2]

The ordinary rule of oral evidence is that it must be given by the witness in the presence of the jury and court. The appearance and manner of the witness on the stand, as well as the opportunity for cross-examination by the opposing counsel, increase the value of his testimony. The absence of a material witness is generally recognized as a good ground for asking a continuance of the case; and one continuance is ordinarily granted as a matter of course. A Missouri statute, however, was sustained as constitutional, which authorized a court in a civil action to refuse a continuance on account of an absent witness, when the opposing counsel admits the facts, which this witness was expected to testify to.[3]

It has also been very generally held to be no impairment

setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being incumbered with those of B. * * * Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law, or the provisions of the constitution, would be a protection to him or his property."

[1] Roth *v.* Gabbert, 123 Mo. 21; Larson *v.* Dickey, 39 Neb. 463.

[2] Daggs *v.* Orient Ins. Co. of Hartford, 136 Mo. 382.

[3] Geary *v.* Kansas City, O. & S. Ry. Co., 138 Mo. 25.

of the substantive rights of action, if a law should be enacted exempting certain property of the debtor from execution, to an extent not permitted when the contract was executed or the judgment was obtained. "Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy to be exercised or not, by every sovereignty, according to its own views of policy or humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community." [1]

It has, for example, been held to be constitutional to provide for the widow of a deceased insolvent an allowance of one thousand dollars out of the estate.[2] But, of late, there has been a change in the current of judicial opinion; and the tendency now, in some of the courts, is to deny the constitutionality of the changes in the exemption law, which are made to, and so far as they do, apply to existing contracts.[3] For example, a South Dakota statute, which provided that the amounts, falling due on a policy of life insurance, "heretofore or hereafter" issued and made payable to the estate of the insured, shall to the extent of five thousand dollars inure to the benefit of the widow, or husband, or minor children, free from the claims of creditors. The court held the statute to be unconstitu-

[1] Taney, C. J., in Bronson *v.* Kinzie, 1 How. 311, 315; Quackenbush *v.* Danks, 1 Denis, 128; *s. c.* 3 Denio, 594; *s. c.* 1 N. Y. 129; Morse *v.* Goold, 11 N. Y. 281; Hill *v.* Kessler, 63 N. C. 437; Martin *v.* Hughes, 67 N. C. 293; In re Kennedy, 2 S. C. 216; Hardeman *v.* Downer, 39 Ga. 425; Maull *v.* Vaughn, 45 Ala. 134; Sneider *v.* Heidelberger, 45 Ala. 126; Farley *v.* Dowe, 45 Ala. 324; Breitung *v.* Lindauer, 37 Mich. 217; Sprecker *v.* Wakely, 11 Wis. 432; Colemau *v.* Ballandi, 22 Minn. 144; Cusic *v.* Douglass, 3 Kan. 123.

[2] In re Mulligan's Estate, 24 N. Y. S. 321; 4 Misc. Rep. 361.

[3] See Duncan *v.* Burnett, 11 S. C. 333 (32 Am. Rep. 476); Wilson *v.* Brown, 58 Ala. 62 (29 Am. Rep. 727); Johnson *v.* Fletcher, 54 Miss. 628 (28 Am. Rep. 388).

tional, as an impairment of the obligation of a contract, so far as it was made to apply to antecedent transactions.[1]

So, it has been held, that homestead laws cannot be made to restrict the right of execution on existing contracts, where there had previously been no homestead law.[2] But a homestead can be claimed against judgments which are procured on existing rights of action arising out of torts; since these claims do not become debts until they are reduced to judgment.[3]

Naturally, an act which exempted all the property of the debtor from execution, would, like the law which deprived the creditor of all remedies, be void, because it impaired the obligation of a contract.[4] In those States, also, where the constitution expressly prohibits special legislation, the exemption law, to be constitutional, must apply uniformly in behalf of all classes of debtors. A statute, which exempted certain enumerated property to the value of five hundred dollars, where the execution was issued on a judgment for labor, other than professional services, was declared in Michigan to be unconstitutional as special or class legislation.[5]

For the same reasons, *i. e.*, that it constituted an impairment of the obligation of a contract, has it been held to be unlawful to provide new defenses, and to apply them to existing contracts. This was the conclusion reached in a case, in which a new defense was given to the process of garnishment.[6] On the other hand, a statute was held to be constitutional, which removed the ground under which

[1] Skinner *v.* Holt (S. D.), 69 N. W. 595.

[2] Gunn *v.* Barry, 15 Wall. 610; Edwards *v.* Kearzey, 96 U. S. 595; Homestead Cases, 22 Gratt. 266 (12 Am. Rep. 507); Garrett *v.* Cheshira, 94 N. C. 396 (12 Am. Rep. 647); Lessley *v.* Phipps, 49 Miss. 790.

[3] Parker *v.* Savage, 6 Lea, 406.

[4] State *v.* Bank of South Carolina, 1 S. C. 63.

[5] Burrows *v.* Brooks, 113 Mich. 307.

[6] Adams *v.* Creen, 100 Ala. 218.

a pending attachment was issued and levied.[1] A more rational case, in which a conclusion similar to that in the last case was reached, is that of denying the validity of a garnishment process which was issued against an assignee for the benefit of creditors after the assignment, and before the enactment of a statute which cured some defects in the assignee's bond. It was held that the garnishment under those circumstances gave the garnishee plaintiff no rights which the legislature could not abrogate by this curative statute.[2]

Another interesting phase of the regulation of rights of action is involved in the enactment of bankruptcy and insolvency laws. The power of the United States, by the enactment of bankrupt laws, to provide for the release of the debtor from his contractual obligations on the surrender of his assets to his creditors, cannot be questioned, because the power is expressly given by the Federal constitution.[3] And it has been settled by the decisions of the United States Supreme Court that the several States may provide similar legislation, subject to the paramount control of Congress. When there is a Federal bankrupt law, it supersedes the State law of insolvency; but the latter comes into operation again upon the repeal of the national bankrupt law.[4] But the State insolvent law, not being authorized by

[1] Day *v.* Madden (Colo. App.), 48 P. 1053.

[2] Freiberg *v.* Singer, 90 Wis. 608.

[3] U. S. Const., art. I., § 8.

[4] See Sturgis *v.* Crowninshield, 4 Wheat. 122; Farmers' and Mechanics' Bk. *v.* Smith, 6 Wheat. 131; Ogden *v.* Saunders, 12 Wheat. 213; Baldwin *v.* Hale, 1 Wall. 223. But the State insolvent laws can have no application to contracts made without the State, or to those made between citizens of different States, unless all the parties to the contract come into court and voluntarily submit to the operation of the State laws. McMillan *v.* McNeil, 4 Wheat. 209; Ogden *v.* Saunders, 12 Wheat. 213; Clay *v.* Smith, 3 Pet. 411; Boyle *v.* Zacharie, 6 Pet. 348; Suydam *v.* Broadnax, 14 Pet. 67; Cook *v.* Moffat, 5 How. 295; Baldwin *v.* Hale, 1 Wall. 223; Baldwin *v.* Bank of Newbury, 1 Wall. 234; Gilman *v.* Lockwood, 4 Wall. 409.

an express constitutional provision, cannot be made to apply to existing contracts, since they cannot be considered as having been made in contemplation of such a law. State insolvent laws can only apply to future contracts.[1]

In the absence of a national bankrupt law, the making of preferential assignments for the benefit of particular creditors is a fruitful source of contention. In most of the commercial States, they are either prohibited altogether, or they are subjected to strict statutory restrictions and limitations. But there seems to be no doubt of the constitutionality of a law which authorized such preferential assignments, or which directly gave preferences to certain classes of creditors; at least, so far as the statutes apply only to future contracts.[2] On the other hand, it has been held in Tennessee to be beyond the power of the legislature to prohibit all preferential transfers of property to satisfy certain debts, without regard to the solvent or insolvent condition of the debtor. The debtor was held to have a constitutional right to transfer property in satisfaction of specific debts, and the prohibition of the preferential assignments must be limited in its application to cases of insolvency.[3]

An assignee for the benefit of creditors has no vested right in his office, and he may by statute be removed without cause.[4]

The property of insolvent debtors is frequently placed in the hands of a receiver, who is appointed by the court, and who administers the property for the benefit of creditors and of the debtor, under orders of the court. The receiver customarily makes contracts in relation to the property, incurs liabilities and sometimes borrows money. Where all of these things are done by him in conformity

[1] Ogden *v.* Saunders, 12 Wheat. 213.
[2] Paddock *v.* Staley, 24 Colo. 188 (49 P. 281).
[3] Third Nat. Bank *v.* Divine Grocery Co., 97 Tenn. 303.
[4] Burt *v.* Barnes, 87 Wis. 519.

with the orders of the court, these liabilities constitute a first lien upon the property in his hands, which must be first liquidated before the creditors receive any payments. Naturally, where the receivership is vacated, without the sale of the property and distribution of the proceeds among the creditors, and the property is restored to the owner, the liabilities which have been incurred by the receiver must be provided for. A statute which provides in such a case that the claims against the receiver must be paid by the owner is clearly constitutional, in every case in which the original appointment of the receiver was lawful.[1]

While a law would be invalid which denied to one all remedy for the redress of his wrongs; and while resort to the courts for a vindication of one's rights may be considered as an absolute right, which cannot be arbitrarily taken away; it is nevertheless true that it is not the duty of the State to keep its courts open indefinitely for the institution of private suits. It has performed fully its duty to the citizen, when it has opened its courts to him for a reasonable time after the right of action has accrued. It is also injurious to the public welfare to permit suits upon stale claims; for the permission of them gives an opportunity for the perpetration of fraud and the infliction of injustice, in consequence of the intermediate loss of evidence and death of witnesses, which prevent the defendant from meeting and disproving the claim of the plaintiff. For these reasons it has for time immemorial, and in all systems of jurisprudence, been considered wise and proper, by the enactment of statutes of limitation, to compel all rights of action to be prosecuted within a reasonable length of time after the action has accrued. And it is also the settled rule of American constitutional law that the amendments to the statutes of limitation can be made to apply to

[1] Missouri K & T. Ry. Co. *v.* Chilton (Tex. Civ. App.), 27 S. W. 272.

existing contracts without impairing their obligation in a constitutional sense, provided after the enactment a reasonable time is given for the institution of the suit.[1]

Some late cases reveal some interesting illustrations of this principle. A Nebraska statute was held to be constitutional, although it provided that no action shall be brought against counties for failure to keep highways and bridges in repair, unless it is commenced within thirty days after sustaining an injury therefrom.[2] A Denver ordinance, which required any one injured upon the streets to give the mayor or city council a full notice of the injury in writing within thirty days after receiving the injury, in order to hold the city liable, was held to be constitutional.[3] On the other hand, a statute was sustained which prohibited parties to contracts from limiting by express agreement the period in which suit on the contract may be brought shorter than two years, and which provided that no stipulation shall be valid, which requires notice of inquiry to be given in a less time than ninety days.[4]

Two cases seem to be in opposition to the general rule as just stated in the text, viz.: that an amendment to the existing statute of limitations may be made to apply to existing causes of actions and contracts, provided a reason-

[1] See Terry *v.* Anderson, 95 U. S. 628; Williams *v.* Eggleston, 170 U. S. 304; Proprietors, etc., *v.* Laboree, 2 Me. 294; Call *v.* Hagger, 8 Mass. 423; Smith *v.* Morrison, 22 Pick. 430; Davidson *v.* Lawrence, 49 Ga. 335; Kimbro *v.* Bk. of Fulton, 49 Ga. 419; Hart *v.* Bostwick, 14 Fla. 162; Barry *v.* Ransdell, 4 Met. (Ky.) 292; O'Bannon *v.* Louisville, 8 Bush, 348; Blackford *v.* Pettier, 1 Blackf. 36; DeMoss *v.* Newton, 71 Ind. 219; Price *v.* Hopkin, 13 Mich. 318; Osborne *v.* Jaines, 17 Wis. 573; Hill *v.* Gregory, 64 Ark. 317; Swampland Dist. No. 307 *v.* Gilde, 112 Cal. 85; State *v.* Messenger, 27 Minn. 119; Adamson *v.* Davis, 47 Mo. 268; Keith *v.* Keith, 26 Kan. 27; Mellinger *v.* City of Houston, 68 Tex. 36; Moody *v.* Hoskins, 64 Miss. 648.

[2] Madden *v.* Lancaster County, 65 Fed. 188; 12 C. C. A. 566.

[3] Cunningham *v.* City of Denver, 23 Colo. 18 (45 P. 356).

[4] Armstrong *v.* Galveston H. & S. A. Ry. Co. (Tex. Civ. App.), 29 S. W. 1117. See, to the same effect, Karnes *v.* Am. Fire Ins. Co., 144 Mo. 425.

able time be given, within which suit may yet be brought on the existing contracts. In New Jersey, it has been held that changes in the existing statute of limitations can not apply to antecedent obligations.[1]

If the existing statute of limitations has run completely against a certain contract or obligation, no amendment thereto can extend the period in which suit might be brought on such a barred cause of action. The retroactive operation of such an amendatory act would be an unconstitutional impairment of the obligation of a contract.[2]

The judgment is the final form of every cause of action, which is contested; and it is said that in every essential sense, the judgment is a contract, which is as much protected against impairment by subsequent legislation as is the original contract or cause of action, which by reduction to judgment becomes merged therein. The laws, therefore, which control the effect and operation of a judgment, cannot be changed by legislation subsequent to the rendition of the judgment, and retroactively change the rights of the judgment creditor. Thus, a law which authorizes the reopening of a judgment, which has been taken in the absence of the defendant, was amended to include judgments which have been rendered upon the verdict of a jury; and the law as amended was made to apply to a judgment on a verdict, which had been rendered prior to the enactment of the amendatory statute. It was held that the amendatory statute was unconstitutional and void, so far as it was given this retroactive effect. It was valid only so far as it was applied to future judgments.[3] And, while the statute of limitation may be changed and applied as changed to existing causes of action, as has already been explained; it has been held that a statutory change of the law relating to the perpet-

[1] Wilkinson *v.* Lemassina, 51 N. J. L. 61; Morris *v.* Carter, 46 N. J. L. 260.

[2] Board of Education of Normal School Dist. *v.* Blodgett, 155 Ill. 441.

[3] Morrison *v.* McDonald, 113 N. C. 327.

uation of a judgment, could not be made to apply to any contract, which was in existence when the statute was enacted.[1]

For the same reasons, it has been held to be unconstitutional for a law to change the period of redemption of mortgaged property in the foreclosure of mortgages, which antedate the amendatory statute.[2] The same conclusion was reached, in the case of an amendatory statute, which took away the right of the mortgagee to a personal judgment against the mortgage, or which limited the enforcement of such a judgment to the property which was included in the mortgage.[3]

On the other hand, apparently in complete opposition to the former trend of authority, it has been held by the Supreme Court of the United States, that the judgment was so far not a contract, as that a law, passed subsequently, may change the rate of interest which may be recovered on all existing judgments, which are based upon a contract which contains no provision for the payment of interest. The court held that in such a case the provision for the payment of interest on the judgment was clearly within the discretion of the legislature, and may be changed at its pleasure, even in relation to existing judgments.[4]

A statute of Rhode Island provided that when a trustee satisfied a final judgment to the amount of the attached property in his hands, it shall constitute a complete and final discharge of the debt on which the judgment rested. The constitutionality of the act was sustained, so far as it affects debts due to non-residents.[5]

[1] Bettman *v.* Cowley (Wash.), 53 P. 53.

[2] Barnitz *v.* Beverly, 163 U. S. 118; overruling Beverly *v.* Barnitz, 55 Kan. 466; State *v.* Gilliam, 18 Mont. 94 (45 P. 661), overruling *s. c.* 44 P. 394; State *v.* Sears, 29 Oreg. 580 (43 P. 482); Swinburne *v.* Mills, 17 Wash. 611 (50 P. 489.)

[3] Dennis *v.* Moses (Wash.), 52 P. 333.

[4] Morley *v.* Lake Shore & M. S. Ry. Co., 146 U. S. 162. Three justices dissented, Justices Field, Harlan and Brewer.

[5] Cross *v.* Brown, 19 R. I. 220.

§ 179. **Regulation of ships and shipping.** — In consequence of the exposure to the dangers of the sea, there would be more or less danger of accident and damage to others in the use of ships, if there were not some legal regulation of their construction and management. All police regulations are therefore lawful, which are designed and tend to diminish the dangers of sea voyaging. They are not subject to any constitutional objections.

In the first place, it is lawful to prohibit the use of unseaworthy vessels, and to provide for the inspection of all vessels and the condemnation of those that are defective.[1] The United States government, under the Federal statutes, have appointed officers, whose duty it is to perform this service to the traveling public. It is also common to limit by law the number of passengers and the amount of freight which a vessel may be permitted to carry ;[2] and it is not unreasonable to require the master or purser of a vessel to furnish to some public officer a statement of the amount of freight or the number of passengers he may have on board.[3] The overloading of a boat with freight or passengers may be considered an actual trespass upon the right of personal security of all those who may be on board of the vessel.

The skill or ignorance of the master or captain, and other officers in charge of the vessel, is of the utmost importance to those who entrust their person or property to their care; and it is consequently permissible to require all those who are applicants for such positions to submit to examinations into their qualifications, and receive a certificate of qualification, without which they cannot assume the

[1] Thus, it was held to be a reasonable regulation, which provided for the inspection of boilers of vessels. Bradley *v.* Northern, etc., Co., 15 Ohio St. 553.

[2] St. Louis *v.* McCoy, 18 Mo. 238; St. Louis *v.* Boffinger, 19 Mo. 13.

[3] Canal Commissioners *v.* Willamette Transp. Co., 6 Ore. 219.

duties of such a post. This is so common and reasonable a regulation that it has never been questioned.[1]

The navigation of a vessel also requires some regulation by law to remove doubt and uncertainty, and to insure uniformity in the rules. The principal legal rules of navigation are those relating to the use of colored lights at night, the regulation of fog signals, and the rules for steering when two or more vessels come into close neighborhood. These regulations are designed to prevent collision, and a detailed discussion of them may be found in any work on shipping and admiralty. It is not necessary to mention them here. We are only concerned with a consideration of the constitutionality of such laws in general. This regulation by law of the rules of navigation consists chiefly in adopting as legal and binding rules those which had met with the approval of the best part of the marine world, and the object of the interference of the government is to secure fixity and uniformity. The constitutionality of these police regulations has never been questioned.

The navigation of a vessel in mid-ocean involves no special difficulty to any one who is at all skilled in navigation. But the entrance into a harbor does require a peculiar knowledge of the coast and of the currents in and out of the bay or river. It would, therefore, be reasonable to require all vessels, on entering a harbor, to be placed in charge of a licensed pilot, and, inasmuch as the law makes it obligatory upon the pilot to beat up and down the coast in search of vessels, which are bound for the port, it is held to be reasonable to compel the master or captain to accept the services of the first pilot who offers.[2]

[1] See *ante*, § 87, in respect to the police regulation of skilled trades and learned professions.

[2] Thompson *v.* Spraigue, 69 Ga. 409 (47 Am. Rep. 760). See Sherlock *v.* Alling, 93 U. S. 99. As to whether the United States or the States have the power to regulate the matter of pilotage, see *post*, 224.

CHAPTER XII.

STATE REGULATION OF THE RELATION OF HUSBAND AND WIFE.

SECTION 180. Marriage, a natural *status*, subject to police regulation.
181. Constitutional limitations upon the police control of marriages.
182. Distinction between natural capacity and legal capacity.
183. Insanity as a legal incapacity.
184. The disability of infancy in respect to marriage.
185. Consanguinity and affinity.
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187. Financial condition — Poverty.
188. Differences in race — Miscegenation.
189. Polygamy prohibited — Marriage confined to monogamy.
190. Marriage indissoluble — Divorce.
191. Regulation of the marriage ceremony.
192. Wife in legal subjection to the husband — Its justification.
193. Husband's control of wife's property.
194. Legal disabilities of married women.

§ 180. **Marriage, a natural status, subject to police regulation.** — Whatever may be one's views concerning the philosophical origin of the institution of marriage; it matters not whether it is viewed as a divine institution and a sacrament, or as the natural result of the social and physiological forces; all are agreed that it has its foundations in nature, and is not a human contrivance. Mankind cannot be conceived as existing without this *status*, for the marital relation is co-existent with, and must have accompanied, the beginning of the creation. The natural element of marriage is discoverable in like relationships among most, if not all, of the lower animals. It is, therefore, but a natural *status*, one that is brought into existence by natural forces, and cannot be successfully prevented or abolished. The natural *status* of marriage works for the good or woe of mankind, according as it is founded in purity and rests

upon sound spiritual and physical foundations, or assumes a contrary character. The welfare of society is inseparably wrapped up with the success of the marital relations of its members; and ill-assorted marriages, marriages between persons who are either mentally or physically unfit to enter into the relation, will surely bring harm to society; while appropriate marriages constitute the very foundation of society, and its welfare depends upon the fostering and encouragement of them. Indeed nations have often provided inducements to enter into the relation, at times when the general extravagance of the people deterred them from assuming the responsibilities of husband and wife. If, therefore, a happy marriage between competent parties redounds to the lasting benefit of society, and a marriage between persons, who through mental or physical deficiencies are incapable of contracting a happy marriage, produces harm to the State, surely the State is interested in promoting and encouraging the former, and discouraging and preventing the latter. The State may, therefore, institute regulations having that purpose in view, in the exercise of the ordinary police power. The right of the State to regulate marriages, determining the capacities of parties, and the conditions of marriage, has never been questioned. Indeed, it would be absurd to assert that the State could not prohibit polygamy, and deny the right of marriage to persons whose marriage, on account of their deficiencies, or on account of their near relationship to each other, is likely to be harmful to society in one or more ways. Mr. Bishop says: [1] "The idea, that any government could, consistently with the general well being, permit marriage to become merely a thing of bargain between men and women, and not regulate it by its own power, is too absurd to require refutation."

The tendency of modern thought is to recognize no

[1] 1 Mar. & Div., § 1.

limit to the power of the government to regulate marriage. "Chief Justice Cockburn, in one case, said that the Parliament could deny the right of marriage altogether. It is not likely that others would go so far in recognition of the police power of the State, for it is generally conceded that marriage is a thing of natural right," [1] and cannot be denied except for some good legal reason. But it does not seem to be settled what are good reasons, and who shall determine what they are. Mr. Bishop says: "Surely it (the government), will retain the right to regulate whatever pertains to marriage in its own way, and to modify the incidents of the relation from time to time as itself pleases." [2] And while he recognizes the natural right to marry, the only benefit derived from this recognition is to throw all presumption in favor of the legality of the marriage, and require the courts to sustain the validity of a marriage, "unless the legal rule which is set up to prevent this conclusion is distinct and absolute, or some impediment of nature intervenes." [3] Judge Cooley admits that the State's control of marriage is not unlimited, but finds it difficult to determine the limitations. He says: "If the regulations apply universally and impartially, a question of constitutional law can scarcely arise upon them, for every independent State must be at liberty to regulate the domestic institutions of its people as shall seem most for the general welfare. A regulation, however, that should apply to one class exclusively, and which should not be based upon any distinction between that class and others which could be important to the relation, must be wholly unwarranted and illegal. This principle is conceded, but it is not easy to determine what regulation would come within it." [4]

[1] 1 Bishop Mar. & Div., § 13; Cooley's Principles of Const. Law, p. 228.

[2] 1 Bishop Mar. & Div., § 12. See, also, Pennoyer v. Nuff, 95 U. S. 714.

[3] 1 Bishop Mar. & Div., § 13.

[4] Cooley's Principles of Const. Law, 228.

§ 181. **Constitutional limitations upon the police control of marriages.** — It has been often asserted and explained in the preceding pages that the police power can only extend to the imposition of such restraints and burdens upon natural right as are calculated to promote the general welfare by preventing injury to others, individually or as a community. If this be the true limitation of police power generally, and the governmental regulation of marriage be conceded to be an exercise of police power, the constitutionality of a police regulation of marriage may be tested by determining, whether the regulation is designed, to, and does, prevent a threatening injury to society or to others. If there is no threatening injury and, so far as the judicial eye can discern, the regulation is arbitrary and unnecessary, the court would pronounce against the constitutionality of the regulation. Marriage being a natural right, one is deprived of his liberty and the pursuit of happiness, if such a regulation is permitted to prevent his marriage. If it is only doubtful that the marriage would prove injurious to others or to society, it would, of course, be proper, in conformity with a general rule of constitutional construction, to solve the doubt in favor of the validity of the regulation. But in a clear case of arbitrary regulation, — *i. e.*, where there is no threatening evil outcome of the marriage which the regulation is designed to prevent, it is clearly the duty of the court to declare the regulating law unconstitutional.

For the purpose of testing their constitutionality, regulations of marriage may be divided into those which are designed to prevent injury to society and to third persons, and those which are intended to afford protection to the parties to the contract of marriage. In order that a regulation may be constitutional, it must fall into one of these classes.

They may also be divided into the following classes: (1) Those which relate to the capacity of parties to enter

into a perfect marriage state; (2) those which require certain forms of ceremony; and (3) those which are intended to provide for proper harmony and conduct of the parties to each other in the marriage state, in respect to their actions generally, and also in respect to the control of their property. The constitutionality of police regulations of marriage will be discussed in this order.

§ 182. **Distinction between natural capacity and legal capacity.** — While marriage, when consummated, constitutes a *status*, as a result of the execution of the contract to marry, a valid contract must precede a valid marriage; and the validity of the contract of marriage is determined by the same principles which govern ordinary contracts. Among those elementary principles are the requirement of two persons competent to contract, the agreement, and a consideration, which in the case of the contract of marriage constitutes each other's promise respectively.

The law cannot compel an individual to marry against his will, for it is not a duty to the State to marry. His consent or agreement is necessary to the validity of the contract. When, therefore, the consent is not present, whether it arises from mental inability to give the consent, or from duress or fraud, the contract of marriage, and hence the marriage itself, must be declared void. Hence the marriages of the insane, except during a lucid interval, or of a child of such tender age and immature mind that he cannot be supposed to understand the nature of the contract, and therefore cannot be held to have given his consent, are void or voidable, from the very nature of the case. The rules of law, which provide for the avoidance of such marriages, only lend the aid of the courts to the more effective enforcement of the laws of nature, and do not involve the exercise of police power, since there are no restrictions imposed upon the right of marriage but those

which nature herself commands. Police power is exerted only when an artificial incapacity is created.

§ 183. **Insanity as a legal incapacity.** — If the parties to the contract of marriage are of sane mind when the contract of marriage is made and performed, the subsequent or previous insanity does not affect the validity of the marriage *status*. Having entered into the *status* through a valid contract, the capacity to contract ceases to be of value, since the contract is merged by its performance into a *status*. But if the blood of either of the parties is tainted with insanity, there is imminent danger of its transmission to the offspring, and through the procreation of imbecile children the welfare of the State is more or less threatened. It may not be the policy of the State to impose restrictions upon the marriage of those who suffer from mental unsoundness of a constitutional character, or the danger to the State may not be sufficiently threatening; but if the proper legislative authority should determine upon the establishment of such restrictions, even though they amounted to absolute prohibition, there can be no question as to their constitutionality. The danger to the State, arising from the imbecility of the offspring, has always been considered an all-sufficient justification of the State interference and regulation of marriage.

§ 184. **The disability of infancy in respect to marriage.** — In the general law of contracts, all minors are declared incapable of making a valid contract, and the law determines the age when they attain their majority and are freed from this disability. In most of the States the age of twenty-one is selected for both sexes, while in some of the States females become of age at eighteen. It matters not what may be the age determined upon, the imposition of the disability is an exercise of police power, and is justified on the ground, that on account of his immaturity the

minor is not on equal terms with the adult, and for his own protection he is rendered unable to subject himself to possible extortion or imposition. If it were the policy of the law to impose the same liability upon the right of marriage, the further, and perhaps more important, reason may be urged that persons of such youthful age are unable to provide properly for the wants of a family, and as a protection to the State against pauperism the youth may be prohibited from marriage altogether until he arrives at the age of twenty-one, and his marriage declared absolutely void. But for various cogent reasons, especially the danger of increasing immorality and the delicacy of the situation of both parties, arising from the avoidance of the marriage of persons under age, infancy is no disqualification[1] to the entrance into a completely valid marriage. If the minor is of the requisite physical capacity, the marriage will be valid, notwithstanding infancy; while the contract to marry, like all other executory contracts, is voidable by the infant, although binding upon the adult with whom he may have contracted.[2] But, arising out of the parental control, authorized by the law, a minor may be prevented by his parents from marrying, if he does not elude them. The law requires the consent of the parents to the marriage, only as a preliminary justification of the marriage; but the want of the consent does not invalidate the marriage if it is actually consummated. The present policy of the law is opposed to such stringency, but it would be a lawful exercise of police power to make the consent of the parents necessary to the validity of the marriage.

While infancy in itself does not furnish any ground for

[1] 1 Bishop Mar. & Div., § 144; Gavin *v.* Burton, 8 Ind. 69.

[2] 1 Bishop Mar. & Div., § 143; Hunt *v.* Peake, 5 Cow. 475; Willard *v.* Stone, 17 Cow. 22; Hamilton *v.* Lomax, 26 Barb. 615; Cannon *v.* Alsbury, 1 A. K. Mar. 76; Kester *v.* Stark, 19 Ill. 328; Warwick *v.* Cooper, 5 Sneed, 659; Schouler Dom. Rel. 32.

invalidating a marriage, the physical incapacity arising from a tender age constitutes a natural incapacity, like general impotence, to perform one of the obligations of the marital relation, and more or less affects the validity of the marriage. The physical incapacity of a child renders the marriage inchoate, and it is completely valid only when there is cohabitation after his arrival at the age of puberty. The incapacity is natural; but in order to avoid the necessity of an actual investigation, in each particular case, into the physical capacity of the infant bride or bridegroom, the law provides that males under fourteen, and females under twelve, shall be held to be physically incapable of performing the marital functions. This regulation was derived from the civil Roman law; and, in the warm southern climate, the law no doubt represented correctly the physiological fact that at these ages the average child attained the full powers of a man or woman. But in the more northern latitudes the growth is slower, and children are usually immature at these ages; and changes have constantly been made in the law, in order that it may more readily conform to the actual age of puberty. Such a change has been made in North Carolina and Iowa, and perhaps in other States.[1] But the appointment of an age, when the physical capacity will be presumed, is a police regulation, and is plainly justifiable on the ground that it promotes the general welfare, to avoid the delicate examinations that would otherwise be necessary to establish the fact of capacity; and the law cannot be called into question if it should vary from the physiological facts.

The common law also provides that the marriage of persons, either of whom is under the age of seven, is a mere nullity.[2] Probably the prohibition rests in this

[1] 1 Bishop Mar. & Div., § 142.
[2] 1 Bishop Mar. & Div., § 147

case upon the ground of absolute mental and physical incapacity.

In all of these cases of police regulation of marriage between or by minors, the immaturity of mind or body constitutes the justification for the interference with the natural right, and their constitutionality admits of no question.

§ 185. **Consanguinity and affinity.** — In all systems of jurisprudence, beginning with the laws of Moses, marriages between persons of the nearer degrees of relationship by consanguinity have been prohibited; and in some of these cases, notably that of parent and child, the act of marriage has been declared a crime and punishable as such. The legal justification of this prohibition lies in the birth of imbecile and frail offspring, which is the constant if not invariable fruit of such marriages. The injury to be avoided by the prohibition consists not only of that which threatens the State in the increase of pauperism through the birth of persons likely to become paupers, but also the injury to the offspring. One might, if allowed a certain latitude of speech, be said to have a natural right to come into this world with normal faculties of mind and body; and the prevention of the birth of issue is justifiable, when the parties cannot transmit, at least to a reasonable degree, a *mens sana in corpore sano*. It can never be questioned that the marriage of very near relations has this disastrous effect, although it may be a proper subject for debate at what degree of relationship marriage would be safe. Still, granting the danger of such marriages, the determination of the degrees of relationship, within which marriage is to be prohibited, must be left to the legislative discretion; and although it is strictly a judicial question, whether consanguinity is likely to make a particular marriage disastrous or dangerous, it must be a flagrant case of arbitrary exercise of legislative power, in order to justify judicial interference. It is a general rule of constitutional construction

that all doubts as to the constitutionality of a legislative act must be solved in favor of the legislature.[1]

In England, the relationship by affinity, *i. e.*, by marriage, has been held to be a ground for prohibiting marriage with the relations of the deceased wife or husband, within the same degrees in which consanguinity constitutes a bar to a valid marriage.[2] The reason for this prohibition is set forth in the leading case of Butler *v.* Gastrill,[3] in this language: "It was necessary in order to perfect the union of marriage, that the husband should take the wife's relations in the same degree, to be the same as his own, without distinction and *vice versa;* for if they are to be the same person, as was intended by the law of God, they can have no difference in relations, and by consequence the prohibition touching affinity must be carried as far as the prohibition touching consanguinity; for what was found convenient to extinguish jealousies amongst near relations, and to govern families and educate children amongst people of the same consanguinity, would likewise have the same operation amongst those of the same affinity. And when we consider who are prohibited to marry by the Levitical law, we must not only consider the mere words of the law itself, but what, by a just and fair interpretation, may be deduced from it." If the tests, heretofore given for determining the constitutionality of laws for the regulation of marriage be reliable, no such reasoning as this would justify the prohibition in this country. It would have to be demonstrated that marriages between persons nearly related by affinity produce imbecile or weak offspring, or will otherwise antagonize the public interests, in order that their prohibition may be constitutionally unobjectionable. But there will be very little occasion for testing the constitutionality of this law in this country. Affinity was, and probably still

[1] Cooley Const. Lim. 218.

[2] 1 Bishop Mar. & Div., §§ 314, 315, 316

[3] Gilb., ch. 156, 158.

is, in Virginia, a ground for invalidating marriages, to the same extent as consanguinity,[1] but marriages with the deceased wife's sister, as Mr. Bishop expresses it, "in most of the States, are not only not forbidden, but deemed commendable. It would be difficult to find a person who would object to sueh a union, or pretend that the laws permitting it had wrought injury." [2]

§ 186. **Constitutional diseases.** — If the possibility or probability of the procreation of imbecile offspring be a justification of the laws, whieh prohibit the marriage of near relations and of those afflicted with constitutional insanity; so, likewise, the danger of transmission to the offspring will justify the enforeement of laws whieh prohibit the marriage of those who are suffering from constitutional diseases, which may be transmitted to the fruit of the marriage, or which so deplete the constitutions of the parents that the birth of healthy, vigorous ehildren beeomes impossible. Such would be leprosy, syphilis, and tubereulosis. The same reasoning, which has been presented to support the impediments of insanity and consanguinity, applies to the proposed impediment of eonstitutional diseases, and a repetition of it is unnecessary. This power has not been exercised in this country to the writer's knowledge.

§ 187. **Financial condition — Poverty.** — Not only is the welfare of soeiety threatened by the transmission of a shattered mental or physical constitution to the children, but also by bringing them into the world, when the parents are not possessed of the means sufficient to provide for them. The only diffieulty in the enforcement of such a law, as in the cases of constitutional insanity and disease, lies in determining in what cases the danger is threatening enough to

[1] Com. *v.* Perryman, 2 Leigh, 717; Hutchins *v.* Com., 2 Va. Cas. 331; Com. *v.* Leftwich, 5 Rand. 657; Kelly *v.* Scott, 5 Gratt. 479.

[2] 1 Bishop Mar. & Div., § 319.

justify the interference of the law; and in the case of poverty, there is the further difficulty of proving the condition of pauperism, which would operate as a bar to marriage. It would probably be impossible to enforce the rule against any but public paupers, those who are dependent upon the public alms, and can, therefore, be easily identified. Such a regulation at one time prevailed in Maine, and it was held, when the constitutionality of the law was called into question, that the State may by statute prohibit the marriage of paupers.[1]

§ 188. **Differences in race — Miscegenation.** — When the negro race in this country was for the most part held in slavery, the degradation of a state of servitude operated to create a most powerful prejudice against the black man, although he was a free man. As an outcome of this prejudice, and a popular sense of superiority, the legislatures of very many of the States of this country, particularly in the South, passed laws for the prohibition of marriages between whites and blacks. These laws for the most part still remain upon the statute book, notwithstanding the full and complete recognition of the rights of citizenship of the black man. In some of the States, marriages between the Indian and white race are also prohibited. Although, occasionally, an attempt is made to show some physiological reason for the prohibition, it cannot be denied that the real cause is an uncontrollable prejudice against the black man, and a desire to maintain the inequality of his present social condition. Whatever other reason may be proclaimed, this is the controlling reason. If this be true, if the law has no better foundation than racial prejudice, is the State justified, under the general constitutional limitations, in prohibiting the marriage of a white man and a black woman, or *vice versa*, when the prejudice is not felt by them? Is it not an unwarrantable act of tyranny to

[1] Brunswick *v.* Litchfield, 2 Me. 28.

prohibit such a marriage, simply because the community is prejudiced against it? Some attempt has been made to show that the mixture of blood will cause a general decay of the national strength, either through enfeebled constitutions or sterility; but it does not appear that the truth of the proposition has ever been established. At any rate, in no other country, except where slavery has lately prevailed, has such a law ever been enacted. Unless it can be established beyond a reasonable doubt that the intermarriage of white and black may be expected to produce frail and sterile offspring, or threaten the general welfare in some other well defined way, the duty of the courts is to pronounce these laws unconstitutional, because they deprive the parties, so disposed to marry, of their right of liberty without due process of law. But the prejudice of race has been too strong even in the judicial minds of the country to secure for these laws a scientific consideration, and hence they have been repeatedly held to be constitutional.[1]

[1] See Bailey *v.* Fiske, 34 Me. 77; Medway *v.* Natick, 7 Mass. 88; Medway *v.* Needham, 16 Mass. 157. In Massachusetts the statute was repealed in 1843. State *v.* Hooper, 5 Ire. 201; State *v.* Ross, 76 N. C. 242; State *v.* Kennedy, 67 N. C. 25. "It is stated as a well authenticated fact that the issue of a black man and a white woman, and that of a white man and black woman intermarrying, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites, laying out of view other sufficient grounds for such enactments." State *v.* Jackson, 80 Mo. 175. It has been held that the fourteenth amendment of the constitution of the United States does not apply to such laws, since the prohibition is upon white and black alike. State *v.* Hairston, 63 N. C. 451; State *v.* Reinhardt, 63 N. C. 547; State *v.* Kenny, 76 N. C. 251 (22 Am. Rep. 683); State *v.* Gibson, 36 Ind. 389 (10 Am. Rep. 42); Lonas *v.* State, 3 Heisk. (Tenn.) 287; Ex rel. Hobbs, 1 Woods, 537; Green *v.* State, 58 Ala. 190 (29 Am. Rep. 739); Hoover *v.* The State, 59 Ala. 59; Frasher *v.* State, 3 Tex. App. 263 (30 Am. Rep. 131); Kinney's Case, 30 Gratt. 858. Judge Cooley says: "Many States prohibit the intermarriage of white persons and negroes; and since the fourteenth amendment this regulation has been contested as the offspring of race prejudice, as establishing an unreasonable discrimination, and as depriving one class of the equal protection of the laws. Strictly, however, the regulation discriminates no more against one race

§ 189. **Polygamy prohibited — Marriage confined to monogamy.** — While voicing the universal moral sentiment of a higher civilization, the laws against polygamy likewise furnish to society a protection against the evils arising from the degradation of its females and the procreation of more children than one man is able to support. In monogamy, it is often difficult for the husband and father to provide the proper means of support for the offspring of his only wife; and in polygamy the difficulty would be greatly increased, if the system did not make plodding slaves of the women. There can be no question that the system of polygamy brings about a moral degradation of the women, treating them as mere animals, designed simply to gratify the animal passions of the man who owns them. The wife of a many-wived husband cannot feel for him the noble and ennobling sentiment of love in its higher phase, for the relation she bears to him is anything but ennobling. Then, again, it is estimated, with a reasonable show of accuracy, that the population of the world is nearly equally divided between the two sexes, the adult female predominating to a small extent. If polygamy were legalized, the logical consequence would be that a proportion of men, the number increasing in proportion to the average number of wives to each married man, would be prevented from entering into the marriage state; because through competition a wife had become a luxury, if one could be procured at all, and such men would seek the gratification of their sexual desires in illicit concubinage. Polyandry is and must be the invariable complement of polygyny.

than against the other; it merely forbids marriages between the two. Nor can it be said to so narrow the privilege of marriage as practically to impede or prevent it. Race prejudice no doubt has had something to do with establishing it, but it cannot be said to be so entirely without reason in its support as to be purely arbitrary. The general current of judicial decision is, that it deprives a citizen of nothing that he can claim as a legal right, privilege or exemption." Cooley Principles of Const. Law, 228, 229.

But, at this late day, it is not necessary to point out the evils of polygamy, for the accumulated experience of the oriental world confirms the injurious character of the system which the moral consciousness of the occidental world had discovered, as if by inspiration. So generally and naturally is the evil character of polygamy recognized, that the leading American authority on the law of marriage, without any qualification or preliminary explanation, defines marriage to be "the civil *status* of *one man* and *one woman* united in law for life, for the discharge, to each other and the community, of the duties legally incumbent on those whose association is founded on the distinction of sex.[1] There can be no doubt as to the constitutionality of laws against polygamy, under the general constitutional provisions; but of late the right of government to prohibit and punish polygamy in cases, where its practice is commanded, or at least sanctioned by one's religion, is questioned on the ground that it is a violation of religious liberty, and hence contravenes the constitutional provision, relating to religious liberty. The question has been raised under the United States statutes, which relate to the practice of polygamy among the Mormons of Utah. It has been held by the Supreme Court of the United States that the constitutional guaranty of religious liberty does not extend its protection to the crimes committed under the sanction of religion.[2]

§ 190. **Marriage indissoluble — Divorce.** — Free from legal limitations, in other words, in the absence of police regulations, the status of marriage would not be of any fixed or definite duration. On the contrary, its continued existence would depend upon the mutual good will of the parties; and it could be dissolved at any time that either of them declines to continue the relation, or its duration could

[1] 1 Bishop Mar. & Div., § 3.

[2] See Reynolds *v.* United States, 98 U. S. 145.

be determined by the agreement of the parties: it would require no great degree of imagination, under such a state of affairs, to classify marriages, in reference to their duration, into those for life, for an uncertain period which may last during life, for years, from year to year, or at will. And this was practically the condition of the law of marriage at one time in the Roman empire.[1]

But the best interests of society, as well as those of the offspring, require that the relation should be permanent; and the teachings of morality and religion made this economic necessity a divine command and procured legislative interference, sweeping away all doubts as to the right of the State to interfere. Indeed, morals, religion, political economy and law were so intimately blended together at the time when marriages were first regulated by the State (the beginning antedates the historic age), that probably the reader of the present volume will be astonished to find reasons presented and urged as a justification of this State interference. But it is clear that but for the evil to society or to the offspring, society could not exact of a married couple the duty to maintain the relation any longer than they chose to do so. The moral or religious element cannot in itself furnish a foundation for legislation, although I am sure that the religious teachings on the subject were themselves prompted by a consideration of the evils flowing from marriages, loosely contracted and easily dissolved. So many, and such great evils were supposed to flow from them, that in past time we find churchmen, moralists, and jurists, alike demanding that marriages be declared absolutely indissoluble, except for causes arising before marriage, which invalidated the marriage itself. But since it was not in the power of the State to compel ill-suited couples to live in harmony, or bring them together, if they had separated, they sanc-

[1] See Sandar's Justinian, p. 102, to the effect that marriage under Roman law was dissoluble by mutual consent, otherwise at the instance of one party only for certain violations of the marriage vow.

tioned the separation and legalized it; while the bond of marriage, still held them together, and prevented their re-marriage to others. Such was the English and American common law. The State of South Carolina makes it a subject of loud boasts that she clings to these views of social and moral necessity, even in these degenerate days of easy divorces. "The policy of this State has ever been against divorces. It is one of her boasts that no divorce has ever been granted in South Carolina."[1] But this State stands alone in its adherence to the old law of divorces; while all of her sister States permit divorces for one or more causes, arising subsequent to the marriage, which, under the common law, justified only a divorce *a mensa et thoro*; a separation, which deprived the parties of all their marital rights, but kept them bound together, unable to contract a new marriage. The weakness of human nature being considered, but one moral result might be expected from a denial of the right of divorce, in cases where the parties are unable to live together in peace, viz.: illicit connections increase in number to an alarming extent. In speaking of the position taken by South Carolina, Mr. Bishop says:[2] "So it has become necessary to regulate, by statute, how large a proportion a married man may give of his property to his concubine,[3] — superfluous legislation, which would never have been thought of, had not concubinage been common. Statutes like this are unknown, because not required in States where divorces are freely granted."[4]

[1] Ch. Dargan in Hair *v.* Hair, 10 Rich. Eq. 163, 174.

[2] 1 Bishop Mar. & Div., § 38.

[3] See Denton *v.* English, 3 Brev. 147; Canady *v.* George, 6 Rich. Eq. 103; Cusack *v.* White, 2 Mill, 279.

[4] "In this county," says Judge Nott, "where divorces are not allowed for any cause whatever, we sometimes see men of excellent characters unfortunate in their marriages, and virtuous women abandoned or driven away houseless by their husbands, who would be doomed to celibacy and solitude if they did not form connections which the law does not allow, and who make excellent husbands and virtuous wives still. Yet they

On the other hand, it might well be said that the facility with which divorces can be obtained is calculated to make the parties more uneasy under the friction that is present in different quantities in almost all marriages, and less disposed to sacrifice self-will on the altar of their common good; while the remarriage of divorced parents to others must certainly have a demoralizing influence over the offspring. It has also been asserted that loose divorce laws tend to diminish the growth of population by making it more difficult to provide for the rearing of the children of the divorced and remarried parents. Perhaps laws which grant divorces to a limited extent, for breaches of the marital duties, and yet keep distinctly in view the stability of the marital relation, are best calculated to avoid both the Scylla and Charybdis of this vexed and much discussed problem of society. "It is the policy of the law, and necessary to the purity and usefulness of the institution of marriage, that those who enter into it should regard it as a relation permanent as their own lives; its duration not depending upon the whim or caprice of either, and only to be dissolved when the improper conduct of one of the parties (the other discharging the duties with fidelity as far as practicable under the circumstances) shall render the connection wholly intolerable, or inconsistent with the happiness or safety of the other." [1] Whatever view may be entertained as to the wisdom of denying or granting divorces, and there are all shades of opinion on this subject, the right of the State to regulate the matter has never been seriously questioned. Whether divorces shall be granted or not, is a matter that addresses itself to the discretion of the legislature.

Even the dissolution of a marriage by a special act of the

are considered as living in adultery, because a rigorous and unyielding law, from motives of policy alone, has ordained it so." Cusack *v.* White, 2 Mill, 279, 292.

[1] Simpson, J., in Griffin *v.* Griffin, 8 B. Mon. 120.

legislature is not unconstitutional in those States in which there is no constitutional prohibition of special or class legislation. It has been held by the Supreme Court of the United States that such a statutory dissolution of the marriage does not impair the obligation of a contract in the constitutional sense.[1] The facts of this case are exceedingly interesting, because it would seem that they place the United States Supreme Court, in the light of the decision, and of the language employed by the court, in opposition to the principle of the text, that there must be some justifiable reason for decreeing a dissolution of a marriage, in order to make a divorce a lawful interference with a status and the rights growing out of it, which have been made fixed and durable during a lifetime. The territorial legislature of Oregon, by a special act, dissolved the marriage of a resident of the territory with a non-resident wife; the court holding that the statutory dissolution of the marriage was a valid act of the legislature, even if there was no cause for the divorce, and the wife was not notified of the pending legislation. The act of Congress relating to the acquisition of public lands, required four years' residence on and cultivation of the land, as a condition precedent to the acquisition of full title to the land; and if the resident was a married man, at the expiration of this required period of residence and cultivation, the title should be vested in the husband and wife in equal parts. It seems that the wife in this case did not share the husband's trials and privations as a pioneer; and it would not be in opposition to the principles of the text, if this legislative divorce had been upheld on the ground that desertion of the wife had justified the dissolution of the marriage. The suit was brought by the son as heir of the deceased mother, for the recovery of her share of the land under the statute; and this divorce, which had been decreed by special act of the legislature,

[1] Maynard *v.* Hill, 125 U. S. 190.

prior to the termination of the four years' residence, and to the vesting of the title to the land, was set up as a defense.

Somewhat along the same line of thought, have the New York courts held it to be constitutional to empower a court to increase the allowance of alimony after rendering its final judgment of divorce, even though the judgment had been given and entered up before the enactment of the statute, which gave this authority to the court.[1]

Where there is a constitutional prohibition of special or class legislation, the laws which bear upon the same subject-matter are required to be general and uniform in character, and to apply to all persons who may fairly be included in the class to which the laws relate. This general rule finds application to divorce laws in a case from New Jersey. The legislature had provided by an amendatory statute for a limited divorce for certain causes, whenever the petitioner for divorce had conscientious scruples against an absolute divorce; but the provision did not apply in any other case. The statute also provided for the effect of the limited divorce upon the rights of property of the husband and wife. This statute was declared to come within the definition of class legislation, and was for that reason unconstitutional and void.[2]

§ 191. **Regulation of the marriage ceremony.** — It requires no painstaking elucidation of the grounds upon which to justify State regulation of the ceremony, by which is established an institution, in which the welfare of the State is so vitally concerned, as marriage. It is certainly not unreasonable for the State to provide a fixed, certain mode of entering into marriage, provided the ceremony, thus selected, is of such a character, that no one would be prevented from entering into the *status*, on account of religious scruples, or an inability to comply, which did not

[1] Walker *v.* Walker, 47 N. Y. S. 513; 21 App. Div. 219.
[2] Middleton *v.* Middleton (N. J.), 35 A. 1065.

arise from his legal incapacity for marriage. According to the old English law, the marriage was held to be invalid, unless the ceremony was performed by a clergyman of the Church of England.[1] So, also, in the Papal States, before their annexation to the kingdom of Italy in 1870, no marriage was valid unless it was solemnized by one in holy orders in the Catholic Church. A religious ceremony has been required in other countries. It is manifest that, while the State may prescribe that a religious ceremony, possessing certain features, shall constitute a valid solemnization of the marriage, it would be a violation of the religious liberty, guaranteed to all by the American constitutions, if the State compelled one, against his will, to submit to a religious ceremony of marriage, or else be denied the privilege of entering into the marriage state. The ceremony prescribed by the State, and made obligatory upon all, must be of such a character that all can conscientiously comply. A regulation, like the German law of marriage, which makes a ceremony before a civil magistrate necessary to the validity of a marriage, would not violate any constitutional right, not even of those who view marriage in the light of a religious sacrament, for the religious ceremony is not forbidden.

The policy of our country, in the main, has been to leave the law of marriage, in respect to the formality of its solemnization, as it was in all Christendom, before the Council of Trent, which declared it to be a sacrament and enjoined a religious ceremony, viz.: that no particular ceremony is required, simply a valid contract in *verba de præsenti*, by which the parties assume to each other the relation and duties of husband and wife. And where statutes provide for the issue of a marriage license, they do not make the license necessary to the validity of the marriage, the only

[1] See Reg. *v.* Millis, 10 Cl. & F. 534. The decision in this case was by a divided court, and the conclusion has been warmly opposed, although acquiesced in, in England. See 1 Bishop Mar. & Div., §§ 270–282.

effect of the statute being that the minister or magistrate who performs the ceremony is subject to a fine, if he officiates in a case in which no license has been granted.[1] But the present state of the law furnishes no argument against the constitutionality of a statute which requires some formal ceremony, subject to the exceptions and limitations already mentioned.

§ 192. **Wife in legal subjection to the husband — Its justification.** — As a matter of abstract or natural justice, the husband and wife must stand on a plane of equality; neither has the right of control, and both can claim the enjoyment of the same general rights. There are many conscientious people who think differently; but apart from the influence or teachings of the Bible on this subject, with every such person the thought is but the resultant of his desires and prejudices. Considering the married couple in a state of isolation, eliminating every influence they may exert upon other individuals, their offspring for example, or upon the general welfare of the State, the conclusion is irresistible, that any subjection by law of the wife to the commands of the husband would be a deprivation of the wife's liberty without due process of law, and, therefore, void under our constitutional limitations. And such would likewise be the conclusion, considering the couple in their relation to society, and to their offspring, if the ideal marriage became the rule, and absolute harmony and compatibility of temper prevailed in every household. This is, however, at least for the present, an unattainable ideal. There are many individual couples, who have attained this ideal of the domestic relation, where each is "solicitous of the rights of the other," and where "committing a tres-

[1] See State *v.* Madden, 81 Mo. 421; State *v.* Walker, 36 Kans. 297, in which the constitutionality of a law was contested and sustained, which made it a misdemeanor for any one to solemnize a marriage where the parties have not previously obtained a license.

pass" is "the thing feared, and not being trespassed against," and self-sacrifice, not encroachment, the ruling principle.[1] With such couples there is no subjection of the wife to her husband, and there is never any inequality of position, where the true, genuine sentiment of love inspires every act; for the subjection of one to the other is incompatible with the reign of love.

But this is not always the case. Indeed, such a relation between husband and wife constitutes the exception, rather than the rule. In the words of Herbert Spencer,[2] "to the same extent that the triumph of might over right is seen in a nation's political institutions, it is seen in its domestic ones. Despotism in the State is necessarily associated with despotism in the family." The remnant of the savage within us still nurses the desire to rule, and the instinct of selfishness, when unchastened by the principles of altruism, is displayed in the dealings of husband and wife, as of man with man. Might is right, between whatever parties the question may arise. Left, therefore, in a state of nature, it will be a rare exception that the parties to a marriage will sustain an equality of rights; as a general rule, one of them will be the ruler while the other will be the subject, sometimes submissive, but usually more or less rebellious. In most cases, in which this state of affairs exists at all, the contention and discord continue during life, unless before death a beneficent divorce law enables the parties to take leave of each other and go their way alone. Discord in the family destroys all the benefits that might be expected to accrue to the community, even if it does not amount to a positive breach of the peace. It demoralizes the offspring as well as the parties themselves; and if by a regulation of their conduct towards each other the State could secure a reasonable degree of harmony, the result would justify the interference as tending to promote the general welfare.

[1] Spencer's Social Statics, p. 188.

[2] Social Statics, p. 179.

How shall this intercourse be regulated? Shall the State require the maintenance of substantial equality between two people whom nature has endowed unequally, both mentally and physically? I do not mean in this connection to assert and defend the position, often taken, that women are essentially and radically inferior to men. I merely desire to make the statement, that as a general proposition the man rules, it may be by greater intellectual strength, or it may be by brute force or financial inequality, probably in most cases by the latter. It sometimes happens, but it is the exception, that the woman is the stronger, and she then rules, whatever the law might have to say upon the subject. The maintenance of a fictitious equality, one that is not the legitimate product of the social forces, by the mandate of the law, — even if that were possible, and it is not, — would not tend to increase harmony in the domestic relations. Left to themselves the stronger will rule, and the stronger will rule notwithstanding the law proclaims an equality. Harmony can only be approximated by legalizing the rule of the stronger, at the same time placing around it such safeguards as will secure for the weaker protection against the tyranny and cruelty of the stronger. The wife is not subjected by the law to the control of the husband, because the husband has a right to rule, but because he is generally the stronger, and will have the mastery even though the law might give the control to the weaker. If women were usually the stronger sex, the husband would be in subjection to them, as they are now, when the husband finds more than his match in his wife. In the management of the things and interests which they hold in common, the husband rules by nature as by law.

Legalizing his natural control, the ancient law in many countries held him responsible to others for all the acts of trespass which the wife may commit. Even to this day, in most of the States, a husband is responsible to third persons for all wrongs against them committed by his

wife; while he is to a certain extent responsible to the State for all the crimes committed by his wife in his presence. Whichever of these facts, the husband's control or his responsibility for his wife's acts, be considered the primal fact, the other must be the legitimate and necessary consequence. In proportion that his power of control is diminished, must his responsibility for her acts be lessened, until the happy era is reached, when there will be neither control nor responsibility. But what degree of control and responsibility is to be permitted is left to the legislative discretion.

§ 193. **Husband's control of wife's property.** — Starting out with the proposition, that in the eye of the law husband and wife are looked upon as one person, a duality of which the husband is the head and legal representative, the legal personality being merged in that of her husband, the necessary logical consequence is that he acquires, either absolutely or during coverture, all the rights of property which she possessed, for rights can only be predicated of a legal personality. For this reason, therefore, in the days when the study of law was an exercise in the rigid rules of logic, instead of an earnest effort to discover the means by which substantial justice may be meted out, the wife's property passed upon marriage, with herself, under the control of the husband. There were other reasons, which might have appeared important in the primeval days of the common law, and justified in the minds of the framers of the law this legal absorption by the husband of the wife's property, as well as herself. Under the early law as now, the husband was obliged to support the wife, and it was thought but fair that he should have the management and control of all the property that she might have, in consideration of this obligation to support.[1]

[1] See Addoms *v.* Marx, 50 N. J. L. 253, in which it was held that a statute, which made the husband liable for and on the debts and con-

But probably the best reason for this rule may be found in the fact, that when the feudal system prevailed, there were no obligations of citizenship, except such as arose out of the relation of lord and vassal in respect to the land which the latter may hold under the lord, and for which the vassal had to render services of various kinds, usually of such a nature that only a man could perform them.[1] When, therefore, lands were acquired by a woman, by descent or otherwise, who subsequently married, her husband had to perform the services due to the lord, and it was but just that he should have the credit of it. The same reasons did not apply to personal property, but in this rude age personal property was inconsiderable; and consisted chiefly of such that a married couple would use in common, household goods and domestic animals, which after a long use in common with like property of the husband, would well-nigh pass beyond the possibility of identification; and, because of this difficulty, the law gave to the legal representative of the duality all such property that was not capable of easy identification, as constituting part of the wife's paraphernalia.

These reasons are not presented as the justification of such a law at the present day. So grossly unjust has it been felt to be for years and centuries, that with the aid of equity's corrective influence over the common law, whereby the hard logic of the common law may be respected and yet substantial justice be within the reach of all, it has been possible for any one about to convey property, whether real or personal, to a woman, or for the young woman herself, before marriage, to so settle her property, that it shall

tracts of the wife, was unconstitutional so far as it was made to apply to marriages, which had been contracted before the enactment of the law. This is a singular retrogression to the policy of the old English common law.

[1] See Tiedeman on Real Property, § 20; 1 Washb. on Real Prop. 46, citing 3 Guizot Nat. Hist. Civ. 108.

remain her separate property, free from the control of her husband, notwithstanding the rules of the common law. And it is probably on account of the means, furnished by equity jurisprudence, of escape from the hardships of the common law in this respect, that the statutory changes, now so common, were not made ages ago. Indeed, it is the firm conviction of many jurists that statutes, which give to married women the same absolute and exclusive control over their property, which they had when single, do not confer upon woman an unmixed good. For while she is thus given the unlimited power of control over her property, she may ruin herself financially, by giving heed to the persuasions of her husband, against which she cannot usually hold out, more readily than she could when, under the rules of equity, her separate property is settled upon her, with limitations upon her power of control, imposed for her own protection. But there can be no doubt that the common law in respect to the property rights of married women, in the present age, cannot be justified by any rule or reason known to constitutional law, however just it may have been under the feudal system. But it is to be supposed that in consequence of the proverbial conservatism of the law, and the remarkable longevity of common-law principles, the wrong can only be remedied by statutory changes.[1]

§ 194. **Legal disabilities of married women.** — It is also a consequence of the legal theory, that the personality of the wife is lost in that of the husband, that married women are placed under various legal disabilities, the most important of which is that they cannot make a valid contract. If

[1] "Marriage is not simply a contract; but a public institution, not reserved by any constitutional provision from legislative control; and all rights in property, growing out of the marital relation, are alike subject to regulation by the legislative power." Noel *v.* Ewing, 9 Ind. 37. See *ante*, § 135, for a full discussion of the power of the legislature to change the marital rights of husband and wife in the property of each other.

they could not hold property in their individual capacity, it would hardly be consistent to give them the power to make contracts in their own names. As agents of their husbands, they could make any contracts that came within the scope of their expressed or implied authority; but they were not allowed to make contracts, the performance of which they could not guarantee, since their property was not subject to their control. When equity provided a way, in which a married woman could hold separate property, she was permitted in equity to make contracts in respect to such property, and the creditors could enforce such claims against the separate estate by instituting the proper action in a court of equity. This was but just, for the disability to contract was but a consequence of the common-law rule, which gave to the husband the complete control of her property. When, therefore, by statutory changes her property rights are secured to the married woman, free from the control of her husband, there can be no reason or justice in retaining the common-law disability to make a contract, except as a protection to herself against the evil designs of her husband. It is no doubt permissible for the law to provide this protection by making void all her contracts and gifts of property to her husband; but the disability must be kept within these limits, in order to be consonant with common justice.

§ 194

CHAPTER XIII.

STATE REGULATION OF THE RELATION OF PARENT AND CHILD, AND OF GUARDIAN AND WARD.

SECTION 195. Original character of the relation of parent and child — Its political aspect.
196. No limitation to State interference.
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197. Compulsory education.
198. Child's right to attend public school — Separate schools for negro children — Expulsion from school must be for a reasonable cause.
199. Parents' duty of maintenance.
200. Child's duty to support indigent parents.
201. Relation of guardian and ward altogether subject to State regulation.
202. Testamentary guardians.

§ 195. **Original character of the relation of parent and child — Its political aspect.** — The early history of all the Aryan races, from whom the modern European races have sprung, reveals the family, with the husband and father as autocrat, as the primal social and political organization, upon which subsequently the broader organizations of tribe and nation were established. The tribe was a union of families, of Gentes, and the nation a union of tribes. But the family organization remained intact, and the tribal government was represented by the father or head of the family. The other members of the family did not have a voice in the administration of the tribal affairs, nor did the government of the tribe have any control of the concerns of the family. The father and head of the family ruled its members without constraint, could command the services of the child, make a valid sale of the adult children as well as of the minor, and punish them for offenses, inflicting any penalty which his wis-

dom or caprice may suggest, even to the taking of life. Nor did this police control extend only to the offenses committed against the members of the same family. The members of one family bore no legal relation to those of another, except the two heads. If the member of one family was guilty of a trespass upon the rights of a member of another family, the head of the latter family demanded redress from the head of the former, and he would inflict the proper punishment upon his offending kinsman, or else prepare to bear the responsibility of the act in an appeal to the tribal authorities.

It is not necessary to enter into the details of the family relation, in its political character. It is sufficient for the present purposes to say that it is in the political character of the family, as an institution of government, that the father is given this absolute control over the children and others, forming the family of which he is the head and ruler. It is not in his natural capacity of a sire that the justification of this control is to be found. When, therefore, the family ceases to be a subdivision of the body politic, and becomes a domestic relation instead of a political institution, we expect to find, and we do find as a fact, that this absolute control of the children is taken away. The children, like the father, become members of the body politic, and acquire political and civil rights, independently of the father. Then this supreme control is transferred to the State, the father retaining only such power of control over his children during minority, as the promptings of nature and a due consideration of the welfare of the child would suggest.

By the abolition of the family relation as a political institution, the child, whatever may be his age, acquires the same claim to liberty of action as the adult, viz.: the right to the largest liberty that is consistent with the enjoyment of a like liberty on the part of others; and he is only subject to restraint, so far as such restraint is necessary for the promotion of the general welfare

or beneficial as a means of protection to himself. The parent has no natural vested right to the control of his child. Except in the day when the family was a political institution, of which the father was the king or ruler, his power over the child during minority is in the nature of a trust, reposed in him by the State (or it may, historically, be more correct to say, which the State reserved to the father, when the political character of the family was abolished), which may be extended or contracted, according as the public welfare may require. To recognize in the father any absolute right to the control of his child, would be to deny that "all men are born free and equal." For if the child is subject to the commands of the father, as a matter of abstract right, there can be no limitation upon the parental control, except what may be necessary to promote the general welfare, for the prevention of cruelty to the children, and for the protection of the rights of members of other families; the political powers of the father of the patriarchal age could not be taken away from him and vested in some other State organization. The father has as much a right to control the actions of his child when he is over twenty-one years of age as when he is below that age. Liberty, therefore, as we understand it, was not created for him; the heads of families alone are freemen.

But it is said that men are free to do as they please, when they become of age. By what authority are they denied their full liberty until they reach the age of twenty-one? Is a youth of twenty, by nature, less free than the youth of twenty-one? Is it because the father has a natural right to control the actions, and command the obedience, of the youth of twenty, and had not the same power of control over the youth of twenty-one? We have seen that in his political character the father exercised the same absolute control of the members of his family, whatever may be the age of the child or other member of the family. With the abolition of the family, as a political institution, the

parental control was limited to the period of minority of the child, and the adult was free to do as he pleased, being only amenable to the State or society for infractions of its laws. If all men are born free and equal, are entitled to the equal protection of the law, they can claim the enjoyment of equal liberty, whether they be children or parents, infants or adults, under or over twenty-one years of age. It is only, therefore, as a police regulation, that the subjection of minor children to the control of parents may be justified under constitutional limitations. The authority to control the child is not the natural right of the parents; it emanates from the State, and is an exercise of police power.[1]

§ 196. **No limitation to State interference.** — If it be true that the control of children, by whomsoever the control is exerted, is an exercise of police power, and can be justified only as such, on constitutional principles, then the parental control is a privilege or duty, and not a natural right; and this view meets with a tacit acquiescence, as long as the limitations upon the parental control are confined to the ordinary ones, with which long usage has made us familiar. Thus we readily acknowledge the right of the State to punish the parent for inflicting cruel and excessive punishment; and in a clear case of cruel treatment, we would not be shocked if the authorities were to take the child away from the parent. But we are startled if the rule is carried to its extreme limit in laying down the proposition, that, being a privilege, the State may take away the parental control altogether, and assume the care and education of the child, whenever in the judgment of the legislature such action may be necessary for the public good, or the welfare of the child. And such has been, with few exceptions, the opinion of the courts of this country. Thus, at common law, and everywhere in America, in the absence of statutory regulation to the contrary, the father has the absolute control of his minor children, to the exclusion of

a similar right in the mother. Is this discrimination against the mother in recognition of the father's natural right to the custody of the child? If this were true, the legislature of New Jersey exceeded its powers when it provided by statute that the mother, in cases of separation, shall have the custody of children of tender age. But the Supreme Court of that State held that the act was constitutional. In rendering the decision the court said: —

"The argument (that the act is unconstitutional) proceeds upon the assumption that the parent has the same right of property in the child that he has in his horse, or that the master has in his slave, and that the transfer of the custody of the child from the father to the mother is an invasion of the father's right of property. The father has no such right. He has no property whatever in his children. The law imposes upon him, for the good of society and for the welfare of the child, certain specified duties. By the laws of nature and of society he owes the child protection, maintenance, and education. In return for the discharge of those duties, and to aid in their performance, the law confers on the father a qualified right to the services of the child. But of what value, as a matter of property, are the services of a child under seven years of age? But whatever may be their value, the domestic relations and the relative rights of parent and child are all under the control and regulation of municipal laws. They may and must declare how far the rights and control of the parent shall extend over the child, how they shall be exercised, and where they shall terminate. They have determined at what age the right of the parent to the services of the child shall cease and what shall be an emancipation from his control." [1]

It has also been held that Congress has power to enlist

[1] Bennett *v.* Bennett, 13 N. J. Eq. 114. See, also, People ex rel. Zeese *v.* Masten, 79 Hun, 580; Ex parte Liddell, 93 Cal. 633.

minors in the navy or army, without the consent, and against the wishes of the parents.[1]

In New York, also, it has been held that the commissioners of public charity have the power, under the statutes of that State, to bind out to apprenticeship a child left to their care by the father, without providing the means of support, against the father's will or without his consent.[2]

§ 196a. **People v. Turner.** — But, in a late decision of the Supreme Court of Illinois, the natural right of the parent to the custody of his minor child has been recognized and affirmed, and an act of the legislature declared unconstitutional, which empowered certain officers to commit to the reformatory school all minors under a certain age, when he is found to be without the proper parental care.[3] The court say: —

"The contingencies enumerated, upon the happening of either of which the power may be exercised, are vagrancy, destitution of proper parental care, mendicancy, ignorance, idleness, or vice. Upon proof of any one the child is deprived of home, and parents, and friends, and confined for more than half of an ordinary life. It is claimed that the law is administered for the moral welfare and intellectual improvement of the minor, and the good of society. From the record before us we know nothing of the management. We are only informed that a father desires the custody of his child, and that he is restrained of his liberty. Therefore we can only look at the language of the law and the power granted.

"What is proper parental care? The best and kindest parents would differ in the attempt to solve this question.

[1] See United States *v.* Bainbridge, 1 Mason, 71. See, also, to the same effect, People ex rel. Duntz *v.* Coon, 67 Hun, 523; People ex rel. Zeese *v.* Masten, 79 Hun, 580; Ex parte Liddell, 93 Cal. 633.

[2] People *v.* Weisenbach, 60 N. Y. 385.

[3] People *v.* Turner, 55 Ill. 280 (8 Am. Rep. 645).

No two scarcely agree; and when we consider the watchful supervision which is so unremitting over the domestic affairs of others, the conclusion is forced upon us that there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition. Ignorance, idleness, vice, are relative terms. Ignorance is always preferable to error, but at most is only venial. It may be general, or it may be limited. Though it is sometimes said that 'idleness is the parent of vice,' yet the former may exist without the latter. It is strictly an abstinence from labor or employment. If the child performs all its duties to parents and to society, the State has no right to compel it to labor. Vice is a very comprehensive term. Acts, wholly innocent in the estimation of many good men would, according to the code of ethics of others, show fearful depravity. What is the standard to be? What extent of enlightenment, what amount of industry, what degree of virtue, will save from the threatened imprisonment? In our solicitude to form youth for the duties of civil life, we should not forget the rights, which inhere both in parents and children. The principle of the absorption of the child in, and its complete subjection to the despotism of, the State is wholly inadmissible in the modern civilized world."

"The parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it is a principle of natural law. He may even justify an assault and battery in the defense of his children, and uphold them in their lawsuits. Thus the law recognizes the power of parental duty, strongly inculcated by writers on natural law, in the education of children. To aid in the performance of these duties and enforce obedience parents have authority over them. The municipal law should not disturb this relation except for the strongest reasons. The ease with which it may be disrupted under the laws in question; the slight evidence required, and the informal mode

of procedure, make them conflict with the natural right of the parent. Before any abridgment of the right, gross misconduct, or almost total unfitness, on the part of the parent should be clearly proved. This power is an emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted in all well governed States. In this country the hope of the child in respect to its education and future advancement is mainly dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent absorption of this relation would not only tend to wither these motives to action, but necessarily in time alienate the father's natural affections.

"But even the power of the parent must be exercised with moderation. He may use correction and restraint, but in a reasonable manner. He has the right to enforce only such discipline as may be necessary to the discharge of his sacred trust; only moderate correction and temporary confinement. We are not governed by the twelve tables, which formed the Roman law. The fourth table gave fathers the power of life and death and of sale over their children. In this age and country such provisions would be atrocious. If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as *parens patriæ*, exceed the power of the natural parent, except in punishing crime?

"These laws provide for the 'safe keeping,' of the child, they direct his 'commitment' and only a 'ticket of leave,' or the uncontrolled discretion of a board of guardians, will permit the imprisoned boy to breathe the pure air of heaven outside his prison walls, and to feel the instincts of manhood by contact with the busy world. The mittimus terms him 'a proper subject for commitment;' directs the super-

intendent to 'take his body' and the sheriff indorses upon it, 'executed by delivering the body of the within named prisoner.' The confinement may be from one to fifteen years, according to the age of the child. Executive clemency cannot open the prison doors, for no offense has been committed. The writ *habeas corpus*, the writ for the security of liberty, can afford no relief, for the sovereign power of the State, as *parens patriæ*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression. If, without crime, without the conviction of any offense, the children of the State are to be thus confined for the 'good of society,' then society had better be reduced to its original elements, and free government acknowledged a failure." [1]

In a later case, arising under a subsequent statute, act of May 29, 1879, which provides for the committal to the industrial school of dependent infant girls, who are beggars, wanderers, homeless or without proper parental care, it was held that the act was constitutional, and was distinguished from the act under consideration in People *v.* Turner, by better provisions for a judicial hearing before commitment under the act.[2] Laws committing homeless children to in-

[1] This case was also published in the American Law Register, vol. 10 (N. S.), p. 372, with an able annotation by Judge Redfield. The following is a quotation from the annotation: —

"We have read this decision with great admiration. There can be no question, it is a very creditable advance in favor of liberty among the children of white parents, as well as those of more sombre hue. All classes of men, and women too, under this decision, may keep their own children at home and educate them in their own way. This is a very wonderful advance in the way of liberty. It must certainly be a great comfort to a devout Roman Catholic, father or mother, to reflect that now his child cannot be driven into a Protestant school and made to read the Protestant version of the Holy Scriptures. And what is more, his or her child cannot be torn from home and immured in a Protestant prison, for ten or more years, and trained in what he regards a heretical and deadly faith, to the destruction of his own soul. This is right and we hope the court will be able to maintain this noble stand upon first principles."

[2] Ex parte Ferrier, 103 Ill. 367 (42 Am. Rep. 10).

dustrial schools have in other States been generally maintained.[1]

The opposite views of this most interesting phase of police power are thus presented to the reader with great particularity, and the solution of the problem depends upon the nature of the parent's claim to the custody of the child. If it is the parent's natural right, then the State cannot arbitrarily take the child away from the care of the parents; and any interference with the parental control must be justified as a police regulation on the grounds that the assumption of the control of the child by the State is necessary for the public good, because of the evil character of the parents; and like all other similar cases of restraint upon natural right, the commitment of the child to the care of the State authorities must rest upon a judicial decree, after a fair trial, in which the parents have the right to appear and defend themselves against the charge of being unfit to retain the custody of the child. Whereas, if the parental control be only a privilege or duty, granted or imposed by the State, it rests with the discretion of the legislature to determine under what circumstances, if at all, a parent may be intrusted with the rearing of his child, and it is not a judicial question whether the legislative judgment was well founded.[2]

[1] Prescott *v.* State, 19 Ohio St. 184 (2 Am. Rep. 388); Roth *v.* House of Refuge, 31 Md. 329; Milwaukee Industrial School *v.* Supervisors of Milwaukee Co., 40 Wis. 328 (22 Am. Rep. 702); House of Refuge *v.* Ryan, 37 Ohio St. 197.

[2] "The duties and authority pertaining to the relation of parent and child have their foundations in nature, it is true. Nevertheless, all civilized governments have regarded this relation as falling within the legitimate scope of legislative control. Except in countries which live in barbarism, the authority of the parent over the child is nowhere left absolutely without municipal definition and regulation. The period of minority is fixed by positive law, when parental control shall cease. Within this, the age when the child may marry at its own will is in like manner defined. The matter of education is deemed a legitimate function of the State, and with us is imposed upon the legislature as a duty by imperative provisions of the constitution. The right of custody, even, is sometimes made to depend upon considerations of moral

But while we may reach the conclusion, that there is no constitutional limitation to the power of the State to interfere with the parental control of minors, it does not necessarily follow that an arbitrary denial of the parental authority will in every case be enforcible or beneficial. The natural affection of parents for their offspring is ordinarily the strongest guaranty that the best interests of the child, as well as of society, will be subserved, by leaving the child to the ordinary care of the parents, and providing for State interference in the exceptional cases, when the parents are of such vile character, that the very atmosphere of the home reeks with vice and crime; and when it is impossible for the child, under its home influences, to develop into a fairly honest man. The natural bond, between parent and child, can never be ignored by the State, without detriment to the public welfare; and a law, which interferes without a good cause with the parental authority, will surely prove a dead letter. "Constitutions fail when they ignore our nature. Plato's republic, abolishing the family, making infants but the children of the State, exists only in the imagination."[1] These are, however, considerations by which to determine the wisdom of a law; they cannot bring the constitutionality of the law into question, enabling the courts to refuse to carry the law into execution in any case that might arise under it.

fitness in the parent to be intrusted with the formation of the character of his own offspring. In some countries, and even some of our American States, education has for more than a century been made compulsory upon the parent, by the infliction of direct penalties for its neglect. The right of the parent to ruin his child either morally or physically has no existence in nature. The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of the legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law-making power." State *v.* Clottu, 33 Ind. 409.

[1] Bliss on Sovereignty, p. 17.

It may be added to the foregoing discussion that, while it may be conceded that the parents have no natural right to the control of their children, the recognition of which would to any degree limit the constitutional right of the State to interfere; the children may themselves, have constitutional rights which may be invaded by police regulations. This is certainly true, if the State were to establish arbitrary and altogether unreasonable regulations. But the constitutional rights of a minor, no less than himself, are immature; he is under tutelage, either to the State or to his parents, and he is permitted to enjoy only that degree of liberty, which is considered to be good for him. And the police regulations, which are instituted for his protection, or for the promotion of his welfare, are not to be measured by the same norm, which determines the reasonableness or unreasonableness of the regulations of the rights and liberty of the adult. For that reason, it would be no constitutional objection to statutory provisions for the commitment of minors to reformatory schools or houses of refuge, that a longer period of confinement is prescribed, than what is prescribed in the case of the same offenses for the commitment of adults to jails and penitentiaries.[1]

On the principle, that there is no constitutional limitation to the interference by the State with the parental control and rearing of a child, it is not an uncommon thing for legislatures in some cases to prohibit altogether the employment of children in certain employments; and in other cases, to subject their employment to the strictest police regulations, in order that the child's health and welfare may

[1] People ex rel. Duntz *v.* Coon, 67 Hun, 523; Ex parte Liddell, 93 Cal. 633. In a preceding section (§ 52), the State control of infants or minors from the standpoint of the minor, as the independent possessor of constitutional rights, is more fully treated, and to that section, the reader is referred. In other preceding sections (§ 86, 102), the industrial freedom of the minor is explained.

be protected from alike the ignorance and the greed or necessities of the parents. In our large cities, societies for the prevention of cruelty to children are established by law, and are invested with the authority to intervene, and to take into their custody any child who is subjected to the cruelty or neglect of the parents. These societies are also empowered to secure, by the intervention of their agents, the enforcement of the laws, prohibiting or regulating the employment of children. These laws have been very earnestly contested in New York, in respect to their prohibition of the employment of children in theatrical shows and exhibitions. The Penal Code, § 292, of the State of New York makes it a misdemeanor for the parent of a girl under the age of fourteen to procure or consent to her employment or exhibition as a dancer. It was contended that this prohibitive statute was an unconstitutional infringement of the rights of both parent and children. But the law has been sustained by the courts of New York from the trial court to the Court of Appeals. The case deserves a most careful study by the investigator of this branch of the Police Power.[1]

But, of course, the legislative control of children must be reasonable; not only, because an unreasonable regulation will fail of effective enforcement; but also, because even children are entitled to some liberties. Recognizing the fact, that the moral health of children is more endangered by being allowed to be out upon the streets after dark, than by the similar liberty in the daylight, statutes have been passed in some of the States, which have received the popular name of "curfew law," prohibiting persons under twenty-one years of age from being upon the streets and in other public places, after nine p. m., except when they are accompanied by their parents or guardians.

[1] People *v.* Ewer, 19 N. Y. S. 933; 8 N. Y. Crim. R. 383; In re Ewer, 70 Hun, 239; People *v.* Ewer, 141 N. Y. 129.

Such a law was declared by the Texas Court of Appeals to be unconstitutional, because it was an unreasonable interference with the rights of parents and the liberty of the minor.[1]

§ 197. **Compulsory education.** — One of the popular phases of police power at the present day is the education of the children at the expense of the State. For many years it has been the policy of every State in the Union to bring the common school education within the reach of the poorest child in the land, by establishing free schools; and in the estimation of many the best test of the civilization of a people or a State is the condition of its public schools; the more public schools, properly organized, the more civilized. Whatever may be the view one may hold of the question of compulsory education, none but the most radical disciple of the *laissez-faire* doctrine will deny to the State the right to establish and maintain free schools at the public expense, provided the attendance upon such schools be left to the discretion of the child or its parents. When, however, the State is not satisfied with simply providing schools, the attendance to which is free to all; but desires to force every child to partake of the State bounty, against its will and the wishes of its parents, perhaps against the honest convictions of the parent that attendance upon the public schools will be injurious to the child: when this exercise of police power is attempted, it will meet with a determined opposition from a large part of the population. For reasons already explained,[2] the child who is altogether bereft of parental care, cannot interpose any legal objection; for he is presumed to be mentally incapable of judging what will best promote his welfare. But it becomes a more serious question when the child has parents, and they oppose his attendance upon the public school. If the children do not go to any school, it does

[1] Ex parte McCaever (Tex. Civ. App.), 46 S. W. 936.

[2] See *ante*, § 52.

not appear so hard to compel the children to attend the State schools; but it is an apparent wrong for the State to deny to the parent his right to determine which school the child shall attend. And yet the constitutionality of the law, in its application to the two cases, must be governed by the same law. If the control of children is a parental right, instead of a privilege or duty, then in neither case is the State authorized to interfere with the parental authority, unless the parent is morally depraved or insane: while the interference in both cases would be constitutional, if the parental control is held to be a privilege or duty, according to the point of view. It is probable that, under the influence of the social forces now at work the latter view will prevail, and compulsory education become very general, at least to the extent of requiring every child to attend some school within the specified ages.

Since the publication of the first edition of this book, statutes requiring the attendance of all children between certain ages at some school, for a stipulated number of weeks and days in the year, have been enacted in a number of the States. In some of these States, the child is only required to attend school during the required time, but the selection of the school is left to the uncontrolled judgment of the parents. In other States, the attendance upon the public schools of the State is required, unless it can be shown that the private school, to which the child is sent, comes up to the requirements of the school law, and is indorsed, approved or licensed by the board of education, or other State officials, who are charged with the supervision of public education. The constitutionality of laws, which only required attendance upon some school during the school age, leaving the choice of the school to the parent, has never been successfully questioned. They have been uniformly sustained as a constitutional exercise of the police power.[1]

[1] Bissell *v.* Davison, 65 Conn. 183; State *v.* McCaffrey, 69 Vt. 85; Quigley *v.* State, 5 Ohio C. C. 638.

And the statutes, which require the children to attend the public schools, and those private schools only which have been approved or licensed by the State officers, who are charged with the care and control of educational matters, have also been generally sustained. The Vermont statute makes attendance upon a public school obligatory, and does not permit attendance upon any private school to be taken as a substitutive compliance with the law.[1] In Massachusetts, the statute permits attendance upon approved private schools, in the place of the public school; and authorizes even the instruction by a private tutor, if the required branches are taught.[2]

In the States of Illinois and Wisconsin, the school law was in 1891 so amended as to require attendance upon the public schools or upon private schools, which were conducted in accordance with the prescribed regulations, in regard to the branches taught, and the methods of instruction; one of which regulations was that the instruction should be in the English language. All through these two States, there were parochial schools, attached to the Catholic and German Lutheran churches. The Catholic objection to this regulation was, of course, religious. The German Lutheran churches opposed its enforcement, because their ministers were the teachers, eking out a small ministerial salary by the fees, which they received from the instruction of the children of the church. These ministers, as a rule, were foreigners who could not teach in the English language, and who therefore had to give their instruction in German. The enforcement of the regulation, that the instruction shall be conducted in the English language, would have had the practical result of closing up almost all of the parochial schools of the German Lutheran church. The law was most vigorously opposed in both States, and was made the main issue in the succeeding State

[1] State *v.* McCaffrey, 69 Vt. 85.

[2] Commonwealth *v.* Roberts, 159 Mass. 372.

elections, with the result that the obnoxious provision was expunged by the subsequent legislature. But, on the principles herein set forth and explained, there can be little doubt of the constitutionality of the regulations.

§ 198. **The child's right to attend the public school — Separate schools for negro children — Expulsion from school must be for a reasonable cause.** — Notwithstanding the universal adoption in this country of the policy of furnishing a free common school education for all children, in the absence of an express constitutional guaranty of such a system of public schools, no one's constitutional right would be violated, if any State should fail to make provision for the proper maintenance of the public schools. But if the policy of free education is adopted by a State government, the education must be free to all the children of the State, without favor and without discrimination against any particular class, or against any particular individual child. The constitutional guaranty of equal privileges and immunities extends to the school children, and requires the provision for the equal and uniform enjoyment of the same educational advantages by all the children. Any law, which granted special provisions for the education of a particular class to the exclusion of other children, would be unconstitutional, in that it was class legislation and the grant of exclusive privileges. Thus, it is a common provision of the school law of the different States that no child is entitled to free education in any other school district but the one, in which he resides with his parent or guardian. A statute of Pennsylvania, — which authorized the children of the soldiers of the War of the Rebellion to attend the public schools in any district which they, or their parents, or guardian, may select, irrespective of the residence of the latter, — was held to be unconstitional and void as class legislation.[1]

[1] York City School District *v.* W. Manchester School District, 8 Pa.

A much vexed question, arising under this heading of the constitutional rights of children, is that which involves the constitutionality of laws, which provide for the maintenance of separate schools for negro children and the prohibition of their attendance at the schools which were established for the exclusive benefit of the whites. These laws are found in all of the Southern States; and similar laws have been enacted in a few of the Western Northern States. They are of a piece with the laws which require the use by negroes of separate railroad coaches and other public conveyances; and the same principle determines their constitutionality or unconstitutionality.

It is not one of the constitutional rights of the negro race that it should enjoy association with the white race in any of the social or non-political relations of life. All classes are alike guaranteed *equal*, but not *identical* privileges. Where, therefore, the negro population is large enough to induce the State legislature to establish separate schools for the exclusive education of negro children, their constitutional rights have not been violated by a refusal of admission to the schools, which have been established for white children, if the same grade of education, and the same facilities and accommodations, are provided for both classes of the population. Any discrimination whatever, in favor of one and against the other, which results in the provision of an inferior standard of education, or inferior accommodations for the enjoyment of free education, for one or the other of the two races, would be a clear violation of the constitutional guaranty of equal privileges.

In the Northern and Western States, at the present day, there is no general statutory provision for the establishment of separate schools for negro children; and it is very generally held in those States, that, where there is no statu-

Dist. R. 97; Sewickley School District *v.* Osborne School District, 19 Pa. Co. Ct. 257; 6 Pa. Dist. 211; 27 Pittsb. Leg. J. (N. S.) 440.

tory authority for such separate schools, the local boards of education have not the power to establish them, or to deny to a negro child admission to any school, which a white child, similarly conditioned, may enter;[1] while, in other States, the State laws expressly prohibit the establishment of separate schools.[2] But, in times past, the constitutional power to establish separate schools has been conceded in all of the States, in which the question has been raised.[3]

The constitutions of some of the Southern States expressly require the establishment of separate schools; and in all of them, whether there be a constitutional mandate or not, legislation which provides for the maintenance of separate schools, and denies to the negro child the right to attend the schools which are provided for the white children, is very generally sustained; at least, when the accommodations and facilities for the maintenance of the schools show no discrimination against the black children.[4] Some of the Southern States, however, in the establishment of separate schools for the two races, show unmistakable discrimination against the negro children, either in the scope of the education, in the accommodations and equipment of the school, or in the proximity to the places of residence of the pupils; and yet a number of the courts have held the statutory provision for separate schools to be constitutional, notwithstanding the discrimination against the negro race. Thus, in Mississippi, it is held to be lawful for a town to establish, outside of the general system of public schools, a

[1] Knox *v.* Board of Education, 45 Kans. 152; Board of Education *v.* Tinnon, 26 Kans. 1; People *v.* Board of Education, 18 Mich. 399; Board of Education *v.* State, 45 Ohio St. 555.

[2] People *v.* Board of Education, 127 Ill. 613; State *v.* Duffy, 7 Nev. 342; Wysinger *v.* Crookshank, 82 Cal. 588; Marion *v.* Oklahoma, 1 Okl. 210; 32 P. 116.

[3] See Cory *v.* Carter, 48 Ind. 327; State *v.* Gray, 93 Ind. 303; Stewart *v.* Southard, 17 Ohio, 402.

[4] See Hare *v.* Board of Education, 113 N. C. 9; Union County Court *v.* Robinson, 27 Ark. 116; Maddox *v.* Neal, 45 Ark. 121.

special school for the exclusive use of the whites; and bonds, issued by a town for the construction of a school building for such an exclusive use, are valid.[1] In Georgia, in the provision for separate schools, the school law directed a division of the fund for building schools between the two races, in the proportions of the taxes, which were paid by them respectively. The constitutionality of the statute was sustained.[2] A contrary conclusion was reached by the Supreme Court of Kentucky, in regard to the constitutionality of an act of the legislature, which, in establishing separate schools for negro children, excluded these schools from participation in the "common school fund."[3] The same adverse decision was recently made by the Supreme Court of Virginia because the statutes, in directing the establishment of separate schools, discriminated against negro children in the provision for the maintenance of their separate schools.[4]

The Missouri school law provides for the establishment of separate schools for negro children in every school district in which there are fifteen or more resident negro children of the school age; and where less than that number of negro children reside in a district, these children shall be entitled to attend school in any county or district in which a separate school is maintained for negro children; but they shall not be admitted to the white school of the district in which they reside. The Supreme Court of Missouri sustained the constitutionality of these provisions of the school law,[5] and the court held that the right of the children to attend the schools of the State is a privilege belonging to a citizen of the State, and not to him as a citizen of the United States.[6]

[1] Chrisman *v.* Town of Brookhaven, 70 Miss. 477.
[2] Reid *v.* Town of Eaton, 80 Ga. 755.
[3] Dawson *v.* Lee, 83 Ky. 48.
[4] Williams *v.* Board of Education (Va.), 31 S. E. 985.
[5] Lehew *v.* Brummell, 103 Mo. 546.
[6] "The common school system of this State is a creature of the State

I do not think, however, there is any room for doubt that the Federal courts would take jurisdiction in such a case and pronounce against the constitutionality of any provision of the school law of the State, which discriminated against the negro children in any material way. And this particular decision of the Missouri court, would most certainly be reversed, if the case had been taken up on appeal to the Supreme Court of the United States. In one case, a United States judge charged the jury that a provision for the attendance of negro children at separate schools was void, if the separate school was too remote, or the advantages for education were inferior to those which were provided in the schools for white children.[1]

A State law, which excluded negro children from a school which had been established by the State for the benefit of Indian children, was held to be constitutional and valid.[2]

A very peculiar and interesting question has arisen in connection with provisions of the Florida school law, which prohibit the attendance of white and black children at the same school. The prohibition is universal and comprehensive in its terms, so that it not only operates impartially against both races, so that the blacks are prohibited from attending the schools for the whites, as well as are the whites prohibited from attending the schools for the blacks; but it likewise applies to both private and public schools.

A missionary society had established a private school in Florida for the benefit of negro children, in a section of the State in which no efficient, if any, provision had been made for the education of the children of either race. The

constitution and the laws passed pursuant to its command. The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States."

[1] U. S. *v.* Bunton, 13 Fed. Rep. 360.

[2] McMillan *v.* School Committee, 107 N. C. 609.

society desired to extend the privileges of their school to the white children of the community, when this prohibitory statute was enacted to prevent this mingling of the races. I do not think that there can be much doubt of the constitutionality of the law, inasmuch as it operates equally against both races.

The right of all children of a school district to the enjoyment of the privileges of the public school is so fixed and protected by law that not only may one force an entrance into the school if he is debarred admission in the first instance; but he may secure reinstatement, if he should be suspended or expelled for an unreasonable cause, or in the enforcement of an unreasonable rule. Still, children are under the obligation to obey all reasonable regulations for the orderly management of the school; and if they violate these reasonable rules, they may be suspended or expelled by the school authorities, and their right of attendance forfeited. This is a simple and rational application to child life of a principle of law, which is universally followed in adult life.[1]

§ 199. **Parent's duty of maintenance.** — The law of every civilized nation imposes upon the parent the duty to maintain and support the child during his period of infancy, when he is unable to support himself. Having brought the child into the world, he owes this duty, not only to the child, but to society as well, and the legal enforcement of this duty is a justifiable exercise of police power. Probably no one will dispute this, as long as the duty is confined to the support of the child during the time when it is physically or mentally incapable of providing for its own maintenance; and the duty may be made to last

[1] Hodgkins *v.* Rockport, 105 Mass. 475; Watson *v.* City of Cambridge, 157 Mass. 561; Bishop *v.* Inhabitants of Rowley, 165 Mass. 460; Board of Education *v.* Purse, 101 Ga. 422; Fessman *v.* Seeley (Tex. Civ. App.), 30 S. W. 268; Cochran *v.* Patillo (Tex. Civ. App.), 41 S. W. 557.

as long as the incapacity exists, notwithstanding it is permanent and will continue through life to old age. But when there is no actual incapacity, and the child is really able to provide for himself or herself, may the State impose upon the parent the duty to support the child during the time that the State requires the child to be in attendance upon the schools? This might very properly be considered a doubtful exercise of police power. Still, if the education is necessary to make the child a valuable citizen, and can be made compulsory; as long as this requirement is kept within the limits of necessity, it would seem that the maintenance of the child during its attendance upon the school would be as much the duty of the parent, as to provide for the child's physical wants during its early infancy. If the question is ever raised, and this is quite likely in any effort to make compulsory education a realized fact, it will probably be settled in favor of the power of the State to impose this duty.

Unless it is otherwise stated in the law, when reference is made to the rights and duties, which children possess and owe, legitimate children are meant; and a child is legitimate or illegitimate, according to the declarations of the municipal law of the country of his residence. The ordinary rule of the common law, which is the prevalent rule in this country, in the absence of statutory modification, is that a child is legitimate only when it is born in lawful wedlock. The subsequent marriage of the parents does not legitimize the offspring born before marriage, as it does in the Roman law. A number of the States have adopted the Roman rule, but requiring that the putative father shall after the marriage acknowledge the paternity of the child. There can be very little doubt that such a statutory change would not infringe any vested rights or constitutional limitations, if the statute were given a retroactive affect, and children already born out of wedlock were legitimized by the statute. The rights of legitimate

children to maintenance and to a share of the patrimony are not so vested, as to furnish the ground for constitutional objection to such a retroactive law, which extends the enjoyment of these rights to children, who, under the law in force at the time of their birth, were illegitimate and were denied these rights. This has been the conclusion of the Supreme Court of South Carolina in sustaining a statute of that State, passed in 1865, which provided that every colored child heretofore born shall be the legitimate child of "his colored father, if he is acknowledged by such father." The act was intended to avoid the confusion and doubt in such matters, which it was supposed would arise out of the loose and obscure marriages of slavery.[1]

§ 200. **Child's duty to support indigent parents.** — Blackstone says: "The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected us in the weakness of infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance."[2] In the support of the claim of a moral duty, the reasons assigned by Blackstone are all sufficient, but they cannot constitute the basis of a legal duty. Independently of statute, in England and in this country, the child is under no legal duty to support its aged parents.[3] But statutes have been passed

[1] Callahan *v.* Callahan, 36 S. C. 454.

[2] 1 Bl. Com.

[3] Rex *v.* Munder, 1 Stra. 190; Lebanon *v.* Griffin, 45 N. H. 558; Stone *v.* Stone, 32 Conn. 142; Edwards *v.* Davis, 16 Johns. 281; Reeve Dom. Rel. 284.

§ 200

in England, and in most of the United States, providing for the legal enforcement of this obligation; at least, to the extent of relieving the public from the support of the paupers.[1] The same legal duty has been imposed upon children by the laws of other countries, for example, the Athenians.[2]

On what ground can the imposition of these statutory duties be justified? Gratitude is the reason assigned by Blackstone for the exaction of the moral duty. Will the law undertake to compel children to manifest to their parents gratitude for past care and maintenance? That is clearly not the object of the statutes. Their object is to relieve the community of the necessity to support the aged and indigent. As a protection against an increased public burden, the law compels the child to support his parents. The State has a clear right to compel the parent to maintain his infant child, because the father or mother is responsible for its birth. They brought the child into the world, primarily and, in ordinary cases, chiefly to gratify their own desires; and it is but just that the State should compel the parents to relieve the community of the necessity of supporting their offspring. But the child has done nothing, which in any legal sense would make him responsible to the public, to provide his aged parents with the means of support. The law can never be invoked for the purpose of enforcing pure moral obligations; nor can a law be justified by the fact, that its enforcement compels incidentally the performance of a moral or religious duty. Clearly, there is no reason arising out of the relation of parent and child, upon which can be rested a legal duty of the child to support the parent. If it can be justified on constitutional grounds at all, as an exercise of police power, it can only be as a

[1] Schouler Dom. Rel. 365; 2 Kent, 208.

[2] 1 Bl. Com. 453; 2 Kent's Com. 207.

special tax upon the child, and is constitutional or not, according as special taxes are permitted or prohibited by the limitations of the constitution.

§ 201. **Relation of guardian and ward altogether subject to State regulation.** — Inasmuch as the guardian is ordinarily appointed by a court of the State in which the minor resides, there can be no doubt that the rights, obligations and duties of guardian and ward to each other are subject to the almost unlimited control of the State. The guardianship is instituted for the benefit of the minor, and it is for the legislature to determine what will advance his interests.[1] But there is some doubt involved in determining the limitations of police power in the control and regulation of the powers and duties of

§ 202. **Testamentary guardians.** — They are those who are appointed by testament by the parent of the minor child. It is permitted by the law of England and of the United States for the father to appoint by testament a guardian by will, and it might very well be urged that, if the parent has a natural right to the care and control of his minor child, he would have a right to determine who shall succeed him in the enjoyment of this right. The one position is no more unreasonable than the other. But the argument in favor of the right to appoint testamentary guardians is historically weakened by the fact that it did not exist at common law, the privilege being granted for the first time by statute (12 Charles II.). "It is clear by the common law a man could not, by any testamentary disposition, affect

[1] It has thus been held that in the capacity of a guardian of his minor child the father is competent to sue for injuries to the child, without making the child a party to the suit. In his character as a guardian, he appears in the suit as the representative of the child, so that the child is a party by representation. See Lathrop *v.* Schulte, 61 Minn. 196; Hess *v.* Adamant Mfg. Co. of America, 66 Minn. 79.

either his land or the guardianship of his children." [1] It is our own opinion that all guardianships are trusts or privileges, and do not confer upon the guardians any absolute rights; and such has been the conclusion of the courts, in the few cases in which the question has been raised.[2]

[1] Lord Alvanley in Ex parte Chester, 7 Ves. 370. But see Coke Lit. 87b, in which there are statements, calculated to throw doubt upon the correctness of this position, at least so far as the guardianship of the ward's person is concerned.

[2] Beaufort *v.* Berty, 1 P. Wms. 703; Gilbert *v.* Schwenck, 14 M. & W. 488.

CHAPTER XIV.

POLICE REGULATION OF THE RELATION OF MASTER AND SERVANT.

SECTION 203. Terms "master and servant" defined.
204. Relation purely voluntary.
205. Apprentices.
206. State regulation of private employments.
207. State regulation of public employments.

§ 203. **Terms "master and servant" defined.** — Although these terms were originally referable only to the case of menial or domestic servant, making one of the domestic relations, strictly so-called,[1] they have been so extended in their application as now to be synonymous with employer and employee. A servant in the legal sense includes now, not only the menial servants of the household, but every class of persons, who for a compensation obligate themselves to render certain services to another. It may be true that in another age and under an earlier civilization, "the relation of master and servant presupposes two parties who stand on an unequal footing in their mutual dealings;"[2] but that cannot be said of the relation at the present day, and under the American law. Certain employments denote and compel the recognition of social inferiority. But in the sight of the law the servant stands on a plane of equality with his master, and the constitution guarantees a like protection to the rights of both.

§ 204. **Relation purely voluntary.** — The relation of master and servant is purely voluntary, resting upon the

[1] See Schouler Dom. Rel. 599.
[2] Schouler Dom. Rel. 599.

contract of the parties, and as a general proposition it must ever remain voluntary. The relation ordinarily cannot rest upon compulsion. Every man has a natural right to hire his services to any one he pleases, or refrain from such hiring; and so, likewise, it is the right of every one to determine whose services he will hire. "It is a part of every man's civil rights," says Mr. Cooley,[1] "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts; and if he is wrongfully deprived of this right by others, he is entitled to redress." This natural right is not limited simply to the formation of the relation of master and servant. Each party has the right to stipulate the terms and conditions upon which he will enter into the relation and refuse to form it, if the other party declines to yield to his demands. Government, therefore, cannot exert any restraint upon the actions of the parties, nor interfere, except at the call of one of the parties, to enforce his rights under the contract which constitutes the basis of the relation. The law may establish certain presumptions of the intentions of the parties, where they have not expressly agreed otherwise; but the right to agree upon whatever terms they please cannot be in any way abridged, as long as there is no trespass upon the rights of third parties or of the public.

§ 205. **Apprentices.** — But apprenticeships constitute an exception to this general rule; the ground for the exception being the minority of the apprentice when he enters into service. His right to make a valid contract for apprenticeship constitutes a legal exception to his general disability, and is, therefore, subject to whatever regulations

[1] Cooley on Torts, p. 278.

the State may see fit to impose. The immaturity of the apprentice places him on an unequal footing with his master, and he deserves and requires the protection of the law.

§ 206. **Regulation of private employment.** — But between adults, employer and employed, since all men are free and equal, and are entitled to the equal protection of the law, neither party can be compelled to enter into business relations with the other, except upon his own terms, voluntarily and free from any coercion whatsoever. The State has no right to interfere in a private employment and stipulate the terms upon which the services are to be rendered.

Ordinarily, this proposition will be readily conceded; particularly, if one considers the question in its bearings upon his own affairs. A feeling of indignation arises within us at the contemplation of State interference to determine the wages we shall pay to our domestic servants. But in so far as the question is removed from its relation to our own affairs, so that it becomes less and less influenced by our prejudice and self-interest, the contemplation of the social inequalities of life, and the truly heartless, if not iniquitous, oppression which is afforded by reason of these inequalities; when we see, more and more clearly each day, that the tendency of the present process of civilization is to concentrate social power into the hands of a few, who, unless restrained in some way, are able to dictate terms of employment to the masses, who must either accept them or remain idle; when at best they are barely enabled to provide for the more pressing wants of themselves and families, while their employers are, at least apparently, accumulating wealth to an enormous extent; when all this injustice exists, or seems to exist, the impulse of a generous nature is to call loudly for the intervention of the law to protect the poor wage-earner from the grasping cupidity of the employer.

That there is much suffering among the working classes there can be no doubt. And although there may be room for conjecture, whether the suffering is not largely due to their own improvidence and a desire to imitate the luxurious habits of the rich, rather than the oppression of the capitalists, it is certainly true that the employers occupy a vantage ground, by which they are enabled to appropriate to themselves a larger share of the profits of the enterprise. But he has acquired this superior position, this independence, through the exertions of his powers; he is above, and can to some extent dictate terms to, his employees, because his natural powers are greater, either intellectually or morally; and the profits, which naturally flow from this superiority, are but just rewards of his own endeavors. At any rate, no law can successfully cope with these natural forces.

But there is undoubtedly a certain amount of unrighteous oppression of the working classes. In making the contract of hiring, the employer and workman deal with each other at arm's length. Generally speaking, so far at least as the settlement of the terms of hiring is concerned, their rights and interests are antagonistic. It is to the interest of the employer to get a given amount of work done for the lowest wages possible, and it is to the interest of the wage-earner to get the highest wages obtainable for the given amount of work. If the parties cannot agree upon the terms which will be mutually profitable, can the law determine this dispute for the contesting parties? By statute 30 and 31 Vict., ch. 105,[1] "equitable councils of conciliation," composed of delegates selected by the masters and workingmen, were empowered to adjust all such disputes, and determine the rate of wages to be paid to the workmen. As long as the submission of such disputes to such a council be left voluntary, the statute could meet with no

[1] 1867.

constitutional objection, if it should be enacted in any of the American States. But its constitutionality would be very doubtful, if the submission was made compulsory. There is an irreconcilable inconsistency in seeking the protection of the law because of inequality in the possession of economic power, and yet proclaiming one's equality before the law. As soon as the law places one for any just reason under a disability, or gives to another a privilege not enjoyed in common by all,[1] protection from oppression becomes a duty of the State, so far as the disability or its cause, or the grant of the privilege, produces or renders the oppression possible. The law can only guarantee to men, on a legal plane of equality, protection against trespasses upon their rights. To place the working classes under special protection against the aggression of capital, beyond the careful and strict enforcement of their rights; to compel the employer to pay the rate of wages, determined by the State to be equitable, is to change the government from a government of freemen to a paternal government, or a despotism, which is the same thing.

But even if this reasoning should not be sufficient to prove the unconstitutionality of State interference in the relation of master and servant, the very futility of such interference would at least cast a doubt upon its constitutionality. Law can never create social forces. On the contrary, law is the resultant of the social forces. If the social forces at work at any given time produce an inequality in the material conditions of classes of society, and give rise to the oppression of one class by another; if the inferior class is not naturally strong enough to resist the oppression, when free from legal restraints, no law can afford it protection. For how can the workingman secure the enforcement of a law made for his protection, when the protection of the State is required, because his needs

[1] See *ante*, §§ 96, 97.

and the necessities of his family compel him to submit to the unrighteous exactions of the capitalist. Will not the same needs and necessities force him to place by his vote men in the various State offices, whose antipathy to his interests will make the law a dead letter, if not secure its repeal? In England, where suffrage is limited, such a law is somewhat reasonable, because those for whose benefit it was enacted are under legal disability. But, in this country, where suffrage is universal, and the wage-earners constitute a vast majority of the voters; if they are unable to assert their claims without the aid of law, they cannot do so with its aid. And thus their inefficacy confirms the unconstitutionality of laws, which are designed to protect the workman against the oppression of the employer. Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments, are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right, and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law, whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which the employer may demand. There can be no constitutional interference by the State in the private relation of master and servant except for the purpose of preventing frauds and trespasses.

§ 207. **Public employments.** — But when the employment is connected with a public interest; and, particularly, when it is connected with the enjoyment of a franchise or privilege, not enjoyed by private individuals, — a privilege which is granted because it will promote the public welfare, such as the railroad, the telegraph, the telephone, and the like, — the public is interested in the proper conduct of the business; and any disturbance of, or interference with, its regular and orderly prosecution will materially affect the

public interest. Where the privilege is a monopoly, as is practically the case with the telegraph in the United States, a general disagreement of the employer with his operatives may often stop the wheels of industry and produce a general paralysis of all commercial energies; and although the operatives of the railroad or of the telegraph are no more entitled to the aid of the law in enforcing their demand, or in securing better terms from their employers, than the strictly private workman, any disagreement between the railroad and telegraph companies and their employees affects the public interest by interfering with their means of communication and transportation; and to promote the general welfare, not to aid the operatives, it is a legitimate exercise of the police power of the State to compel both parties to submit their claims to a competent tribunal; thus adjusting their differences, and preventing an injury to the public. There may be a practical inability to enforce even such a law, because of the powerful political influence of the capitalists; but it is nevertheless, justifiable, on constitutional grounds, because the legal equality is disturbed in these cases by the grant to the corporation of a franchise, a privilege not obtainable by the workman.[1]

[1] NOTE. — The labor contract and the relation of employer and employee have been already fully discussed in Chapter IX. and the reader is referred to the sections of that chapter relating thereto for what otherwise he might expect to find in this chapter.

CHAPTER XV.

STATE REGULATION OF CORPORATIONS.

SECTION 208. The inviolability of the charters of private corporations.
209. State control of corporations.
210. Freedom from State control, as a franchise.
211. Regulation of corporations in general.
212. Laws regulating rates and charges of corporations.
213. Regulation of foreign corporations.
214. Regulation of railroads.

§ 208. **The inviolability of the charters of private corporations.** — At a very early day, it was decided by the Supreme Court of the United States that the charter of a private corporation constituted a contract between the State and the stockholders or members of the corporation, by which the State, in consideration of the public benefit, and of the investment of capital in the corporate business, grants to these capitalists the power to act together as one legal personality, with corporate powers and liabilities, separate and apart from the individual responsibilities of the members. The opinion of Chief Justice Marshall, in the leading case on this subject,[1] has been so often affirmed by the Federal courts, as well as by the State courts,[2] that it may now

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518.

[2] See Planters' Bank *v.* Sharp, 6 How. (U. S.) 301; Trustees, etc., *v.* Indiana, 14 How. (U. S.) 268; Piqua Bank *v.* Knoop, 16 How. (U. S.) 369; Hawthorne *v.* Calef, 2 Wall. 10; Binghamton Bridge Case, 3 Wall. 51; State *v.* Noyes, 47 Me. 189; Wales *v.* Stetson, 2 Mass. 143; Central Bridge *v.* Lowell, 15 Gray, 106; Grammar School *v.* Burt, 11 Vt. 632; Backus *v.* Lebanon, 11 N. H. 19; People *v.* Manchester, 9 Wend. 351; Commonwealth *v.* Cullen, 13 Pa. St. 133; Cleveland, etc., R. R. Co. *v.* Speer, 56 Pa. St. 325; Zabriskie *v.* Hackensack, etc., R. R. Co., 17 N. J. Eq. 178; State *v.* Mayor of Newark, 35 N. J. L. 157; Bank of Old Dominion *v.* McVeigh, 20 Gratt. 457; Bank of State *v.* Bank of Cape Fear, 13

be laid down as a settled principle of constitutional law, that an act of incorporation is such a contract between the State and the incorporators as is protected by the clause of the Federal constitution, which denies to the States the power to pass any law impairing the obligation of a contract.[1] Any law, therefore, of a State which impairs the corporate rights, or which repeals, annuls or amends the corporate charter, against the wishes of the members of the corporation, impairs the obligation of a contract, and is consequently void.

But this has reference only to private corporations, *i. e.*, corporations, which are composed of private persons. Although it is frequently stated by the courts that municipal corporations have a quasi-private character, their charters do not constitute contracts between the State and the municipality, which would preclude the repeal or amendment of the charters, or a curtailment of the charter powers, in accordance with the doctrine of the Dartmouth College case.[2]

Ired. 75; Mills *v.* Williams, 11 Ired. 558; Young *v.* Harrison, 6 Ga. 130; State *v.* Accommodation Bank, 26 La. Ann. 288; State *v.* Tombeckbee, 2 Stew. 30; Commercial Bank *v.* State, 14 Miss. 599; Mobile, etc., R. R. Co. *v.* Moseley, 52 Miss. 127; Sala *v.* New Orleans, 2 Wood (U. S. C. C.), 188; State *v.* Southern, etc., R. R. Co., 24 Tex. 80; Hamilton *v.* Keith, 5 Bush, 458; Marysville Turnpike Co. *v.* How, 14 B. Mon. 429; Mechanic's Bank *v.* DeBolt, 1 Ohio St. 591; Edwards *v.* Jagers, 19 Ind. 407; Flint *v.* Woodhull, 25 Mich. 99; Bruffet *v.* G. W. Ry. Co., 25 Ill. 353; St. Louis *v.* Manufacturers' Sav. Bank, 49 Mo. 574; Farrington *v.* Tennessee, 95 U. S. 679.

[1] See an ingenious argument against the correctness of the decision of the court in the Dartmouth College Case, in 8 Am. Law Rev. 190. The writer of the article, *inter alia*, makes the point that, inasmuch as the author of this clause of the constitution, Judge Wilson, of Pennsylvania, afterwards of the Supreme Court of the United States, was a Scotch lawyer, and therefore learned in the Roman or Civil law, we must look to that system for the real meaning of the phrase "obligation of a contract." In the Roman law, *obligatio ex contractu*, invariably meant a pecuniary liability.

[2] See Gas & Water Co. of Downington *v.* Corporation of Borough of Downington, 175 Pa. St. 341.

Some illustrations, not intended to be exhaustive, may be added in explanation of the general principles herein set forth.

In the first place, the charter must be accepted, or the parties investing their capital in the enterprise must have entered upon the project, or must have made provision for the same. Where, therefore, corporations are formed under general incorporation laws, the provisions of those laws do not constitute contracts with a corporation, until the charter has been granted in compliance with the provisions of those laws. These incorporation laws may be changed at the pleasure of the legislature and subsequent incorporators cannot claim that the subsequent amendments to the incorporation law have impaired the obligation of a contract, because of prior contracts which they had entered into looking to incorporation. Thus, a New York statute authorized the purchasers of a railroad franchise, at a sale under foreclosure, to form a new corporation, with all the rights, powers and privileges of the old corporation. An amendment to this law imposed, as a condition precedent to the procurement of a new incorporation, the payment into the State Treasury of a sum, equal to one-eighth of one per cent of the proposed amount of capital. The authorization of incorporation, as just explained, was held not to be a contract in the constitutional sense, but was only a regulation of law, which could be amended at the will of the legislature, and parties applying subsequently for a charter must comply with the law as amended; although property rights may have been acquired previously, in reliance upon the law of incorporation remaining unchanged.[1] And even where a special charter is granted to a corporation, the charter is always subject to amendments, contracting the corporate rights or increasing the corporate burdens,

[1] People *v.* Cook, 110 N. Y. 443; *s. c.* 148 U. S. 397. See, to same general effect, Ashley *v.* Ryan, 153 U. S. 436.

as long as the incorporators have not accepted the charter or acquired vested rights thereunder. In one case, in which this ruling was made, an amendment to the charter of a railroad was passed four days after the passing of the original charter, and at the same session of the legislature.[1] Of the same character is the statutory right to issue stock in exchange for deposits, which is granted in a bank charter. The Supreme Court of the United States held that this provision did not create a contractual right, which was beyond modification by law.[2]

A subsequent statute cannot change the conditions, prescribed in the charter or in the incorporation laws under which the charter was obtained, which must be observed in procuring amendments to the charter;[3] nor can the conditions, under which property is donated to an eleemosynary corporation, be changed by subsequent legislation; as where property and capital are donated for the maintenance of a certain kind of school or college, and a corporation is formed with the express power of receiving the gift and to carry out the purpose of the donor.[4] So, likewise, is it beyond the power of the legislature to interfere by subsequent statute with the priority of liens, or other rights of the creditors of an existing corporation.[5]

In accordance with the ruling of the Supreme Court of the United States, in the Charles River Bridge *v.* Warren River Bridge,[6] the grant of a franchise is universally held in this country not to be exclusive, unless it is expressly declared to be exclusive in the charter of incorporation or

[1] Cincinnati, H. & I. Ry. Co. *v.* Clifford, 113 Ind. 460.

[2] Bank of Commerce *v.* State of Tennessee, 163 U. S. 416.

[3] Loewenthal *v.* Rubber Reclaiming Co., 52 N. J. Eq. 440.

[4] Graded School Dist. No. 2 *v.* Trustees of Bracken Academy, 95 Ky. 136; Webster *v.* Cambridge Female Seminary, 78 Md. 193; State *v.* Neff, 52 Ohio St. 375.

[5] Giles *v.* Stanton, 86 Tex. 620; Giles *v.* East Line & R. Ry. Co. (Tex.), 26 S. W. 1111.

[6] 11 Pet. 420.

law, under which the franchise is acquired. In such a case, the grant of a parallel and competing franchise may be granted without impairing the vested rights of the first corporation, even though, through successful competition, the value of the first franchise may be seriously impaired or completely destroyed. But if the franchise is made by express terms of the law or charter to be exclusive, the subsequent grant of a competing franchise would be unconstitutional, as an impairment by subsequent law of the obligation of a contract. This has been held repeatedly in the case of street railways, whose charters contain express limitations of the power of the State or municipality to grant competing franchises to other street railway companies.[1]

The protection, which the principles of the Dartmouth College case afforded to private corporations, against any modification by subsequent laws of its charter rights and privileges, is very considerably reduced by the almost universal reservation to the State of the power to amend or repeal the charters of private corporations, which are subsequently granted.

It is now a very common statutory or constitutional provision, that all charters of private corporations are held subject to the power of the State to repeal or amend. Sometimes, this reservation is inserted in every charter; but this is not necessary. It has been repeatedly held that, where there is a general statutory or constitutional reservation of such power to amend or revoke all charters, the reservation of such power enters into and becomes a constituent of every charter contract, which is subsequently made by the legislature.[2] If the reservation of the power to amend or revoke a charter is a constitutional provision,

[1] City Ry. Co. *v.* Citizens' Street Ry. Co., 166 U. S. 557; *s. c.* 56 Fed. 746. See Shreveport *v.* Cole, 129 U. S. 36; Hamilton Gas Co. *v.* Hamilton City, 146 U. S. 258.

[2] Hamilton Gaslight & Coke Co. *v.* City of Hamilton, 146 U. S. 258; People *v.* Cook, 148 U. S. 397; State *v.* Montgomery Light Co., 102 Ala. 594; Bissell *v.* Heath, 98 Mich. 472.

there is, of course, no discretion to the legislature. But if it is only a provision of the statutory incorporation law, it is within the power of the legislature, in granting a charter by special law, where special laws are constitutional, to except the particular charter from the operation of this reservation of the power to amend or revoke the charter.[1] These cases, just cited, also hold that a statute, which reserves the right to amend or repeal a charter, applies to any subsequent renewal of an old expiring charter. But this is not true, where the statute does not expressly refer to renewals of charters. In such case, the renewed charter is as free from the reserved power to amend or repeal as was the original charter.[2]

But, even in the case of such a reservation, the charter cannot be so amended or repealed as to interfere with the vested rights of property, which the stockholders may have acquired by and through the corporation.[3] But when the statutory amendment to a charter does not involve any practical confiscation of the rights of property of the corporation, it cannot be successfully attacked, it matters not how radical it may be. It has even been held that it is within the reserved power, to amend existing charters of private corporations, to impose upon the stockholders of such a corporation a personal liability to creditors, in double the amount of their stock in the corporation.[4] And where a city gas company fails to carry out its obligations to a city to furnish light to all parts of the city, and to extend its supply pipes, make new connections, as the city grew,

[1] McCandless *v.* Richmond & D. Ry. Co., 38 S. C. 103; Mobile Ins. Co. *v.* Columbia & Greenville Ry. Co., 41 S. C. 408.

[2] Citizens' Street Railway Co. *v.* City of Memphis, 53 Fed. 715.

[3] Holyoke Co. *v.* Lyman, 15 Wall. 500; Southern Pac. Co. *v.* Bd. of R. R. Comrs. (C. C. A.), 78 Fed. 236; Inland Fishery Commissioners *v.* Holyoke Water Power Co., 104 Mass. 446; Worcester *v.* N. and W. R. R. Co., 109 Mass. 103; Thornton *v.* Marginal Freight Railway, 123 Mass. 32.

[4] Bissell *v.* Heath, 98 Mich. 472.

its exclusive franchise may be forfeited and the city be given the power to establish and maintain its own gas-works.[1] In this connection, it must be borne in mind that franchise rights in real property, like ordinary rights therein, are acquired subject to the right of eminent domain by the State. In the exercise of the right of eminent domain, the property of a railroad may be appropriated by the State to a public use, as much so as may be the property of any natural person.[2]

Still, the statement of the text, that vested rights of property cannot be infringed by subsequent legislation, notwithstanding the reservation of the power to amend and revoke a charter, is supported very generally by the authorities. Thus a provision, that no toll bridge or ferry shall be established within one mile immediately above or below an existing ferry or toll bridge, becomes a part of the charter rights of a toll bridge or ferry company, and cannot be abrogated by a subsequent statute, except in the cases, which the statute expressly excepts, if there be such exceptions.[3] It is also an unconstitutional impairment of the obligation of a contract for a constitutional convention by subsequent enactment to repeal a statute which granted to a railroad certain vacant public lands within a certain defined area, and to declare such lands to be open to purchasers, settlers, and holders of genuine certificates.[4] So, also, would a law be unconstitutional, which, in providing for the sale of the franchise of an insolvent street railway, provided that the cost of the obligation, instead of the amount set forth in the contract, shall be the measure of liability to the creditors.[5]

[1] Hamilton Gaslight & Coke Co. *v.* City of Hamilton, 146 U. S. 258.

[2] City of Terre Haute *v.* Evansville & T. H. Ry. Co., 149 Ind. 174. To the same effect, see Citizens' Gaslight of Reading, etc. *v.* Inhabitants of Wakefield, 161 Mass. 432.

[3] Fortain *v.* Smith, 114 Cal. 494.

[4] Houston & T. C. Ry. Co. *v.* Texas & P. Ry. Co., 70 Tex. 649.

[5] People *v.* O'Brien, 111 N. Y. 1.

§ 209. **Police control of corporations.** — It has been supposed that, because it is the settled law of this country that the legislature of a State cannot repeal or amend the charter of a private corporation, unless the power is expressly reserved, these perpetual corporations are placed beyond the reach of the ordinary police power of the State; that, while all the rights of the natural person are subject to the exercise of the police power in the interest of the public, these corporations are free from this burden, because the slightest police regulation operates as a restriction of the enjoyment of the corporate franchise, and hence impairs the obligation of a contract. Such a construction of the operation of this constitutional provision is not only scientifically absurd, but it is in violation of the ordinary rules of constitutional construction, which provide for a strict construction of all grants by the State to the individual. Apart from the question whether the State can barter away its police power,[1] the intention of a legislature to place a private corporation beyond the reach of the police power of the State — to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted — is so manifestly unreasonable that we cannot suppose that the legislature so intended, unless this extraordinary privilege is expressly granted. It cannot be implied from the grant of the charter. The subjection of existing corporations to new police regulations does not involve a repeal or amendment of the charters; for an act of incorporation simply guarantees to the incorporators the right to act and do business as a corporate body, subject, of course, to the laws of the land, and the legitimate control of government. The legal

[1] As to which, see *post*, § 190.

status of the corporation, as an artificial person, does not differ from the natural person, except so far as the charter may reserve or grant special privileges or impose peculiar burdens. As a general proposition, corporations are included under the name of "persons" in coming within the operation of the law. In order that the law may apply to corporations, it is not necessary that they be expressly named.[1] Thus general laws, relating to the validity or enforcement of contracts, are applicable to corporations, although persons are only mentioned.[2] So, also, are corporations included in the operation of laws relating to real estate, in which there is reference only to "inhabitants" and "occupiers."[3] Corporations are taxpayers, like natural persons, although the tax laws should speak only of "persons," "individuals," or "inhabitants;"[4] and a law, relating to practice or procedure, which refers to "persons" or "residents," would also include corporations within its operation.[5]

[1] Beaston *v.* Farmers' Bk., 12 Pet. 102; U. S. *v.* Amedy, 11 Wheat. 392; People *v.* Utica Ins. Co., 15 Johns. 382; Planters' & Mechanics' Bk. *v.* Andrews, 8 Porter, 404. Compare School Directors *v.* Carlisle Bk., 8 Watts, 291; Bair *v.* Worley, 1 Scam. 178. And see Com. *v.* Phœnix Bk., 11 Metc. 129; Androscoggin Water Power Co. *v.* Bethel Steam Mill Co., 64 Me. 441; Chicago, M. & St. P. Ry. Co. *v.* City of Milwaukee, 97 Wis. 418.

[2] Mott *v.* Hicks, 1 Cow. 513; State of Indiana *v.* Woram, 6 Hill, 33; State *v.* Nashville University, 4 Humph. 157; Commercial Bk. *v.* Nolan, 8 Miss. 508.

[3] Curtis *v.* Kent Water Works, 7 B. & C. 314; State *v.* Nashville University, 4 Humph. 157; King *v.* Gardner, Cowper, 79; Lehigh Bridge Co. *v.* Lehigh Coal & Nav. Co., 4 Rawle, 8.

[4] Otis *v.* Weare, 8 Gray, 509; People *v.* Utica Ins. Co., 15 Johns. 358; International L. Ass. Co. *v.* Comrs., 28 Barb. 318; Ontario Bk. *v.* Bunnell, 10 Wend. 186; Baldwin *v.* Trustees, 37 Me. 369; Curtis *v.* Kent Water Works, 7 B. & C. 314.

[5] Knox *v.* Protection Ins. Co., 9 Conn. 430; Mayor of Mobile *v.* Rowland, 26 Ala. (N. S.) 498; Planters' Bk. *v.* Andrews, 8 Porter, 404; Trenton Bk. *v.* Haverstick, 6 Halst. 171; Mineral Point R. R. *v.* Keep, 22 Ill. 9; City of St. Louis *v.* Rogers, 7 Mo. 19; Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. 176; Eslava *v.* Ames Plow Co., 47 Ala. 384; Brauser *v.* New

And so, also, are corporations included within the operation of the constitutional guaranties of the sanctity of the rights of property.[1]

But it has been held that this is not the case in regard to the constitutional guaranty of the liberty of contract. This guaranty is held to be reserved to natural person, persons of flesh and blood, and not to the artificial legal personality, the corporation. On this principle, it is held that while certain police regulations of the liberty of contract may be unconstitutional when they are enforced against natural persons, they are or may be valid as against corporations; that corporations enjoy only that liberty and those powers of corporate action, which the laws allow and no others. It is held, that, where the power to amend or revoke a charter is reserved to the State, the plea, that a police regulation violates some constitutional right, will not restrain its enforcement against the corporation, unless it takes away or infringes some vested right of property.[2] It has thus been held that no vested right is recognized in a corporation, where its charter or the general incorporation law prescribes a special period of limitation for actions against the corporation. Such provision may be changed by subsequent legislation at the pleasure of the legislature.[3]

But where the law, on account of the peculiar character of the corporation as a legal entity, relates to matters

England Fire Ins. Co., 21 Wis. 506; Bristol *v.* Chicago & Aurora R. R., 15 Ill. 436; Bk. of No. America *v.* Dunville, etc., R. R., 82 Ill. 493; Western Transportation Co. *v.* Scheu, 19 N. Y. 408. See Olcott *v.* Tioga R R., 20 N. Y. 210; Commercial M. F. Ins. Co. *v.* Duerson, 28 Gratt. 631.

[1] Wheeling Br. & Tenn. Ry. Co. *v.* Gilmore, 8 Ohio C. C. 658; Citizens' Horse Ry. Co. *v.* City of Belleville, 47 Ill. App. 388.

[2] See Leep *v.* St. Louis, I. M. & S. Ry. Co., 58 Ark. 407, and cases therein cited. See, also, *ante*, §§ 94 *et seq.*, where these cases are cited and discussed in connection with the subject of regulation of the freedom of contract, and *post*, present section, where the cases are fully explained and quoted from.

[3] Louisville & N. Ry. Co. *v.* Williams (Ky.), 41 S. W. 287.

which are connected with and can only concern natural persons, the law cannot apply to corporations. For example, a corporation cannot be a rebel within the operation of the confiscation acts of the United States.[1]

The act of incorporation, therefore, is a governmental act of creation. It creates a legal, artificial personality which becomes the subject of rights, and, like any other legal personality, holds these rights subject to the ordinary laws of the State. Unless there is an express reservation of a freedom from the restraint of police regulations, it would be an exceedingly liberal, and hence wrongful, construction of the constitutional protection, against the impairment of the obligation of contracts, to place corporations above and beyond the ordinary police power of the State. As a general proposition, the principle here advocated has been recognized and adopted by the courts generally. It is only in the application of the principle to a particular case that any doubt as to its correctness is felt or expressed.

The leading case on the subject is that of Thorpe *v.* Rutland, etc., R. R. Co.,[2] in which Judge Redfield has discussed fully and at length the police control of corporations. In referring to the general police power of the State by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State, of the perfect "right in the legislature to do which no question ever was, or upon acknowledged general principles, ever can be made, so far as natural persons are concerned," he says: —

"It is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to a virtual destruction by the legislature; and 2. That it

[1] Risley *v.* Phœnix Bank, 83 N. Y. 318.
[2] 27 Vt. 150.

is an attempt to control the obligation of one person to another, in matters of merely private concern. * * *

"All the cases agree that the indispensable franchises of corporations cannot be destroyed or essentially modified. This is the very point upon which the leading case of Dartmouth College *v.* Woodward, was decided, and which every well considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal policy of railroads, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. * * * This is a control by legislative action, coming within the operation of the maxim, *sic utere tuo ut alienum non lædas*, and which has always been exercised in this manner in all free States, in regard to those whose business is dangerous and destructive to other persons, property, or business. Slaughterhouses, powder mills, or houses for keeping powder, unhealthy manufactories, keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with the equal power to pursue and accomplish it, which I trust has been sufficiently denied."[1] * * *

[1] See, also, to the same effect, Gowen *v.* Penobscott R. R. Co., 44 Me. 140; Cummings *v.* Maxwell, 45 Me. 190; Commonwealth *v.* Intoxicating Liquors, 115 Mass. 153; Lord *v.* Litchfield, 36 Conn. 116 (4 Am. Rep. 41); Frankford, etc., Ry. Co. *v.* Philadelphia, 58 Pa. St. 119; Taggert *v.* Western, etc., R. R. Co., 24 Md. 563; Haynes *v.* Carter, 9 La. Ann. 265;

Several cases have recently taken the advanced, but apparently sound position, that, — certainly, where the power to amend, alter, or repeal the charters of private corporations is reserved by the constitution or by statute, — the private corporation cannot appeal to constitutional limitations for protection against any hostile or obnoxious police regulation; except, possibly, to the constitutional principle of uniformity and equality, whenever such principle is violated by legislation, discriminative between corporations of the same character. These cases hold that the natural rights which the constitutions protect from adverse and excessive regulation, belong to natural persons, and cannot be claimed by corporations, which are creatures of positive law, and have only those powers which are conferred upon them by positive law. The first case I refer to is from Arkansas.[1] An Arkansas statute provided that no employer shall for any reason make any abatement or deduction from the wages of an employee, when he is discharged or when he refuses to work; and that they must pay the wages due on the work on the day of discharge. The Supreme Court of Arkansas held the statute to be constitutional, so far as it applied to employing corporations, but unconstitutional as to those employers who were natural persons. The argument of the court was in part as follows: —

"The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price

Louisville, etc., R. R. Co. *v.* Ballard, 2 Met. (Ky.) 165, Blair *v.* Milwaukee, etc., R. R. Co., 20 Wis. 254; Reapers' Bank *v.* Willard, 24 Ill. 433; Bank of Republic *v.* Hamilton, 21 Ill. 53; Dingman *v.* People, 51 Ill. 277; State *v.* Herod, 29 Iowa, 123; Gorman *v.* Pac. R. R. Co., 26 Mo. 441; Ex parte N. E. & S. W. R. R. Co., 37 Ala. 679; State *v.* Eagle Ins. Co. of Cincinnati, 50 Ohio St. 252; Platte & Denver Canal Milling Co. *v.* Dowell, 17 Colo. 376; State *v.* St. Paul City Ry. Co. (Minn. 1900), 81 N. W. 200.

[1] Leep *v.* St. Louis, Iron Mountain Ry., 58 Ark. 407, 427.

of property sold shall be paid on a day subsequent to the sale. Such a contract is necessarily harmless, of purely and exclusively private concern, and cannot affect any one except the parties. * * * But what is true of persons is not always true of corporations. *Natural persons do not derive the right to contract from the legislature. Corporations do.* They possess only those powers or properties which the charters of their creation confer upon them, either expressly or as incidental to their existence, and these may be modified or diminished by amendment, or extinguished by the repeal of the charters."

In construing a similar statute, regulative of the labor contract, the Supreme Court of Maryland, in Shaffer & Munn *v.* Union Mining Co.,[1] said: —

"It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money. * * * *A corporation has no inherent or natural rights like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferrible from the powers actually granted, or such as may be indispensable to the exercise of such as are granted.*"

So, likewise, the Supreme Court of Rhode Island held a law to be constitutional, which required all private corporations, with certain reservations, to pay their employees weekly, on the ground that the act in question was a permissible amendment to the charter of every manufacturing corporation, under the reserved power to amend or repeal the charters of private corporations. Said the court: —

"But for the power granted by the legislature, corpora-

[1] 55 Md. 74.

tions could not make any contract, and we see no reason why the legislature, under its reserved power to amend charters, cannot limit the power to contract in the future just as they might have fixed it in the original charter, if any reasonable purpose is to be subserved thereby." [1]

§ 210. **Freedom from State control, as a franchise.** — The claim has often been made that, if it is stipulated in the charter of a corporation that it shall not be subjected to a specific police regulation, such a contract is binding upon all the subsequent legislatures, and they are powerless to prevent an injury to the public by instituting this regulation. In other words, it is claimed, that the State may, by contract irrevocably preclude itself from the exercise of its ordinary police power, it matters not what evil consequences to the public may thereby be prevented. The recognition of this doctrine would, if often acted upon, certainly hamper the government in its effort to protect its citizens from threatening dangers. The dangerous character of the doctrine is particularly noticeable in its application to the police control of corporations. The franchise of the corporation, even if it consists only in the privilege of acting and doing business in a corporate capacity, enables it, as against the private individual, to occupy a vantage ground; its power for harming and controlling the rights and interests of individuals is thereby greatly increased, and the necessity for police control, in order that the rights of individuals may not be exposed to the danger of trespass, is proportionately increased. To recognize in a legislature the power by a contract to tie the hands of all future legislatures, and deprive them of the power to interpose regulations that may become needful as a protection to the public against the aggressions or other unlawful acts of the corporation, would be a specimen of political suicide. It has, therefore, been often decided, in the American courts, Federal and State,

[1] State *v.* Brown & Sharpe Mfg. Co., 18 R. I. 16.

that the State cannot barter away, or in any way curtail its exercise of any of those powers, which are essential attributes of sovereignty, and particularly the police power, by which the actions of individuals are so regulated as not to injure others; and any contract, by which the State undertakes to do this, is void, and does not come within the constitutional protection.[1]

In a late case, it has been definitely settled that the power to regulate the actions of individuals and corporations, for the promotion of the public health and the public morals, can never be restricted or suppressed by any contract or agreement of the State. In delivering the opinion of the court, ——, J. says: "The appellant insists that, so far as the act of 1869 partakes of the nature of an irrepealable contract, the legislature exceeded its authority, and it had no power to tie the hands of the legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case. Let us see clearly what it is. It does not deny the power of that legislature to create a corporation, with power to do the business of landing live stock and providing a place for slaughtering them in the city. It does not deny the power to locate the place where this shall be done exclusively. It does not deny even the power to give an exclusive right, for the time being, to particular persons or to a corporation to provide this stock landing, and to establish this slaughter-house. But it does deny the power of that legislature to continue this right so that no future legislature, not even

[1] See Beer Company *v.* Massachusetts, 97 U. S. 25; Fertilizing Company *v.* Hyde Park, 97 U. S. 659; Stone *v.* Mississippi, 101 U. S. 814; Thorpe *v.* Rutland, etc., R. R. Co., 27 Vt. 140, 149; People *v.* Commissioners, 59 N. Y. 92; Hammett *v.* Philadelphia, 65 Pa. St. 146 (3 Am. Rep. 615); Hirn *v.* State, 1 Ohio St. 15; Bradley *v.* McAtee, 7 Bush, 667 (3 Am. Rep. 309); Indianapolis, etc., R. R. Co. *v.* Kercheval, 16 Ind. 84; Toledo, etc., R. R. Co. *v.* Jacksonville, 67 Ill. 37; Chicago Packing Co. *v.* Chicago, 88 Ill. 221.

the same body, can repeal or modify it, or grant similar privileges to others. It concedes that such a law, so long as it remains on the statute book as the latest expression of the legislative will, is a valid law, and must be obeyed, which is all that was decided by this court in the Slaughter-house cases. But it asserts the right of the legislature to repeal such a statute, or to make a new one inconsistent with it, whenever, in the wisdom of such legislature, it is for the good of the public it should be done. Nor does this proposition contravene the established principle that the legislature of a State may make contracts on many subjects which will bind it, and will bind succeeding legislatures for the time the contract has to run, so that its provisions can neither be repealed, nor its obligations impaired. The examples are numerous where this has been done, and the contract upheld. The denial of this power, in the present instance, rests upon the ground that the power of the legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well known but undefined power, called the police power. * * * While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of police power, we think, that in regard to two subjects so embraced, it cannot by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and the public morals. The preservation of those is so necessary to the best interests of the social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." [1]

The same conclusion is reached in respect to the legisla-

[1] Butchers' Union Slaughter-house, etc., Co. *v.* Crescent City Live Stock, etc., Co., 111 U. S. 746.

lative control over contracts which a corporation may make with individuals. Such contracts are ever subject to the future exercise of the police power, in the promotion of the public welfare. This is particularly true in the case of *quasi*-public corporations, such as railroads.[1]

On the principle, that the State cannot barter away its police power, it has been held lawful for the State to prohibit all lotteries, and to apply the law to existing lottery companies.[2] So, also, is it possible for the State to prohibit the sale and manufacture of liquor, although it has previously issued licenses, authorizing the prosecution of these trades,[3] and such prohibitory laws may be enforced against existing corporations, whose charters empower them to carry on the prohibited trade.[4] In like manner, may laws, incorporated in the charter for the government of a corporation, in its relation to the public, be repealed or amended.[5]

[1] Chicago B. & C. Ry. Co. *v.* State, 170 U. S. 57.

[2] Stone *v.* Mississippi, 101 U. S. 814; State *v.* Morris, 77 N. C. 512; Bass *v.* Nashville, Meigs, 421 (33 Am. Dec. 154); Mississippi Soc. of Arts *v.* Musgrove, 44 Miss. 820; Moore *v.* State, 48 Miss. 147 (12 Am. Rep. 367); State *v.* Woodward, 89 Ind. 110 (46 Am. Rep. 160); Commonwealth *v.* Douglass (Ky.), 24 S. W. 233; Douglass *v.* Commonwealth (Ky.), 24 S. W. 233; *s. c.* 168 U. S. 488. See, *contra*, Broadbent *v.* Tuscaloosa, etc., Association, 45 Ala. 170; Kellum *v.* State, 66 Ind. 588.

[3] Calder *v.* Kurby, 5 Gray, 597; Commonwealth *v.* Brennan, 103 Mass. 70; La Croix *v.* County Comrs., 50 Conn. 321 (47 Am. Rep. 648); Met. Board of Excise *v.* Barrie, 34 N. Y. 657; Baltimore *v.* Clunity, 23 Md. 449; Fell *v.* State, 42 Md. 71 (20 Am. Rep. 83); McKinney *v.* Salem, 77 Ind. 213. *Contra*, Adams *v.* Hatchett, 27 N. H. 289; State *v.* Phalen, 3 Harr. 441; Boyd *v.* State, 36 Ala. 329. A license for the prosecution of any trade, which tends to be injurious to the public, may be revoked by a subsequent prohibitory law. State *v.* Burgoyne, 7 Lea, 173. See, generally, State *v.* Cook, 24 Minn. 247; Pleuler *v.* State, 11 Neb. 547. See *ante*, §§ 119–125.

[4] Beer Company *v.* Massachusetts, 91 U. S. 25; Commonwealth *v.* Intoxicating Liquors, 115 Mass. 153.

[5] Bank of Columbia *v.* Okely, 4 Wheat. 235; Baltimore, etc., R. R. Co. *v.* Nesbit, 10 How. 395; Railroad *v.* Hecht, 95 U. S. 170; *s. c.* 29 Ark. 661; Gowen *v.* Penobscot R. R. Co., 45 Me. 140; Ex parte N. E. &

It has thus been held to be constitutional for the legislature to prohibit the consolidation of connecting or competing railroad lines, although their charters may contain an express authorization of consolidation with other companies. Such authorization may be taken away or limited by subsequent legislation, as a police regulation, without impairing vested rights; as long as the regulation does not undertake to undo a consolidation which has been already accomplished.[1] And so, likewise, may a subsequent statute change the conditions, under which a consolidation may be effected. Thus, where the existing law, under which the charter was obtained, provided that consolidation with another railway cannot be made, unless assented to by *all* of the stockholders, these conditions may be changed by subsequent legislation, so that consolidation may be legally made, if the consent to it of the holders of three-fourths in value of the stock is obtained.[2] So, also, street railways may by consequent statute be compelled to pave the roadbed between the tracks.[3]

But it has been held in Illinois that, while the State may regulate the interment of the dead, and in the first instance prescribe the localities in which burial will be permitted, yet it is not possible for the legislature to prohibit burial upon lands purchased and laid out as a cemetery at great expense, by a corporation, which has been chartered for that purpose.[4]

In accordance with the general proposition of constitu-

S. W. R. R. Co., 37 Ala. (N. S.) 679; Howard *v.* Kentucky, etc., Ins. Co., 13 B. Mon. 282.

[1] Pearsall *v.* Great Northern Ry. Co., 161 U. S. 646; Louisville & N. Ry. Co. *v.* Kentucky, 161 U. S. 677.

[2] Market St. Ry. Co. *v.* Hellman, 109 Cal. 571.

[3] Storrie *v.* Houston City Street Ry. Co. (Tex.), 46 S. W. 796.

[4] Lakeview *v.* Rose Hill Cemetery Co., 70 Ill. 192. But see, *contra*, Brick Presbyterian Church *v.* Mayor, etc., 5 Cowen, 538; Coates *v.* Mayor, etc., 7 Cow. 585; Kincaid's Appeal, 66 Pa. St. 423; City Council *v.* Wentworth Street Baptist Church, 4 Strobh. 310. See, also, *ante*, § 149.

tional law, that an exemption from taxation cannot be impaired by subsequent legislation, where such exemption enters as a component into a valid contract, it has been held that, where a corporate charter contains a stipulation for such an exemption, the exemption cannot be taken away by subsequent legislation,[1] unless the right to withdraw it is expressly reserved by the statute which grants the exemption.[2] And the same ruling would obtain, where the charter was issued under a statutory or constitutional provision, which reserved the power to amend or repeal the charter.

A similar ruling is held as to the inviolability of charter stipulations of the rate of compensation which a corporation might charge for services which it renders to the public. But the discussion of these cases is reserved for a subsequent section,[3] in which the whole subject of laws, regulating the rates and charges of corporations, is fully treated.

Where a corporation is given the power to conduct dams and sluices in certain streams, it does not follow that it has the power to completely withdraw the water from other uses in the stream below the dams; and a statute is constitutional which restrains the use of the dams and sluices.[4]

But it is different where, by charter or by general statute, specific property rights are granted to a corporation, such as the grant of lands to a railroad. These cannot be taken away by subsequent statute.[5]

§ 211. **Police regulations of corporations in general.** — But the corporation is no more subject to arbitrary

[1] Barnes *v.* Kornegay, 62 Fed. 671.

[2] Deposit Bank *v.* Davies County (Ky.), 39 S. W. 1030.

[3] § 212.

[4] St. Anthony Falls Water Co. *v.* St. Paul, 168 U. S. 349; Minneapolis Mill Co. *v.* St. Paul, 168 U. S. 349.

[5] Houston & T. C. Ry. Co. *v.* State of Texas, 170 U. S. 243; reversing *s. c.* 90 Tex. 607.

regulations than is the individual; except, possibly, as it has been stated in the preceding section.[1] In order that the regulation of a corporation may be within the constitutional limitations of police power, it must have reference to the welfare of society by the prevention or control of those actions which are calculated to inflict injury upon the public or the individual. As in all other cases of the exercise of the police power, the police regulations of corporations must be confined to the enforcement of the maxim, *sic utere tuo, ut alienum non lædas*, subject to the observance of which every corporate charter must be supposed to have been granted. Any attempt, under the guise of police regulations, to repeal or amend the charter, where the right of repeal or amendment has not been expressly reserved, or to abridge any of the corporate rights and privileges, would of course be unconstitutional and void.[2] The property of the corporation cannot be confiscated, under pretense of being a police regulation, without payment of compensation. Thus, it was held unconstitutional for a law to require an existing turnpike company to set back its first gate two miles from the corporate limits of a town, which had grown up at the original gate, under penalty of forfeiting all right to tolls.[3] The two miles of road, included within the existing turnpike, might have been confiscated in the exercise of the power of eminent domain, but compensation for the loss would have been required. So, also, would it be unlawful to compel a railroad or turnpike to permit certain

[1] See *ante*, pp. 957–959.

[2] State *v.* Noyes, 47 Me. 189; Washington Bridge Co. *v.* State, 18 Conn. 53; Benson *v.* Mayor, etc., of N. Y. 10 Barb. 223; Hegeman *v.* Western R. R. Co., 13 N. Y. 9; Commonwealth *v.* Pennsylvania Canal Co., 66 Pa. St. 41; Bailey *v.* Philadelphia, etc., R. R. Co., 4 Harr. 389; People *v.* Jackson, etc., Plank Road Co., 9 Mich. 285; Attorney-General *v.* Chicago, etc., R. R. Co., 35 Wis. 425; Sloan *v.* Pacific R. R. Co., 61 Mo. 24. See, also, §§ 208, 209.

[3] White's Creek Turnpike Co. *v.* Davidson Co., 3 Tenn. Ch. 396. See Detroit *v.* Plankroad Co., 13 Mich. 140; Goodrel *v.* Kreichbaum, 70 Iowa, 362.

persons to make use of the road without paying the customary toll.[1] And while it is permissible to prohibit a corporation from doing the thing, or engaging in the business, for which it was created, no law can make the corporation responsible for the damages suffered by the public, as a consequence of what the corporation was authorized to do. Thus, for example, where the legislature authorized the construction of a bridge over a navigable stream, of such dimensions that it would necessarily become an obstruction to the navigation of the river, the bridge company could not be made responsible to those whose navigation of a stream was impeded, for that would in effect be a deprivation of the corporate rights.[2] So, also, would it be unlawful for the legislature to provide by a subsequent law for the complete forfeiture of the charter as a penalty for a prohibited act, which under the existing law was a cause for only a partial forfeiture, because the enforcement of the new penalty against a corporation for acts already done would operate to impair the obligation of contracts.[3] So, also, it has been held to be unconstitutional for a statute to provide for the forfeiture of the franchise of a corporation like a turnpike road, in a proceeding of a summary character, in which the right of trial by jury was possible and was denied.[4]

But there is no constitutional objection to the application to existing corporations of new remedies for the attainment of justice, and to secure a performance of the corporate duties to the public.[5] For example, it is lawful for a legislature to extend the individual liability of the

[1] Pingry *v.* Washburn, 1 Aiken, 264.

[2] Bailey *v.* Philadelphia, etc., R. R. Co., 4 Harr. 389.
People *v.* Jackson, etc , Plankroad Co., 9 Mich. 285.

[4] Salt Creek Val. Turnpike Co. *v.* Parks, 50 Ohio St. 568; West Alexandria & E. Turnpike Co. *v.* Gay, 50 Ohio St. 583.

[5] Crawford *v.* Branch Bank, 7 How. 279; Gowen *v.* Penobscot R. R. Co., 44 Me. 140; Commonwealth *v.* Cochituate Bank, 3 Allen, 42.

stockholders of a bank for any debt thereafter incurred.[1] But while the liability of stockholders may be increased, or imposed for the first time, without affecting the constitutional rights of the stockholders, an existing liability to creditors cannot be reduced or taken away altogether, without violating the constitutional rights of the creditors, whose claims against the corporation were acquired prior to the enactment of the amendatory statute.[2] So, likewise, may not the existing claims of creditors against the trustees of a corporation, who are under existing law personally liable under stated contingencies, be affected by subsequent legislation, changing this liability.[3] But a law is valid which provides that existing corporations shall maintain their corporate organizations for a limited period after their dissolution, and continue their capacity for being sued, for the purpose of winding up its affairs.[4] So, likewise, may the laws provide for the sale of the property of an insolvent corporation, and for the distribution of the proceeds of sale among the creditors.[5]

In like manner may the rights of stockholders in existing corporations be regulated and changed, in the protection

[1] Stanley *v.* Stanley, 26 Me. 196; Coffin *v.* Rich, 45 Me. 507; Hathorne *v.* Calef, 53 Me. 471; Child *v.* Coffin, 17 Mass. 64; Gray *v.* Coffin, 9 Cush. 200; Bissell *v.* Heath, 98 Mich. 472; Berwind-white Coal Min. Co. *v.* Ewart, 32 N. Y. S. 716; 11 Misc. Rep. 490; Hirshfield *v.* Bopp (N. Y.), 39 N. E. 817; Tuttle *v.* Nat. Bank of the Republic, 161 Ill. 497.

[2] Close *v.* Noye, 26 N. Y. S. 93; 4 Misc. Rep. 616, following Hawthorne *v.* Calef, 2 Wall. 10.

[3] Fitzgerald *v.* Weidenbeck, 76 Fed. 695.

[4] Lincoln, etc., Bank *v.* Richardson, 1 Greenl. 79; Franklin Bank *v.* Cooper, 36 Me. 179; Foster *v.* Essex Bank, 10 Mass. 245; Nevitt *v.* Bank of Port Gibson, 6 Smedes & M. 513. And a State law of this kind may be made to apply to foreign corporations, in the endeavor to secure a just distribution of their assets lying within the jurisdiction of the State, which enacted the law. McGoon *v.* Scales, 9 Wall. 31; Stetson *v.* City Bank, 2 Ohio St. 114; Lewis *v.* Bank of Kentucky, 12 Ohio St. 132.

[5] Bass *v.* Roanoke Nav. & W. Power Co., 111 N. C. 439; Ellerbe *v.* United Masonic Benefit Assn., 114 Mo. 501.

and promotion of their interests. Provision for minority representation in the directory of a corporation is constitutional.[1] And where the State, under a contract with a railroad corporation, has the right to vote a given number of shares, this right of representation may be surrendered by the State by subsequent enactment, and the directors whom the State had a right to appoint and did appoint may be removed summarily.[2] The State may in the same way temporarily waive its rights as a voting stockholder in a turnpike company.[3]

The State may also grant to stockholders reasonable right of interference in the management of the business of the corporation, such as demanding the right to inspect the books of the company.[4] And it has been held in one case to be constitutional, to authorize any stockholder of a private corporation to require that all the real estate owned by the corporation, which may not be necessary to the transaction of the corporate business, or for the payments of debts, be appraised and partitioned among the stockholders.[5] On the other hand, it is not unconstitutional for a statute, in providing for the closing up of the affairs of mining and manufacturing corporations, not to provide for making all the stockholders necessary parties to the suit, inasmuch as they may become parties, if they want to.[6]

Corporations may also be required to submit to an inspection of their affairs by a public official, in order to ascertain any breaches of duty to the public,[7] or to file with

[1] Attorney-General ex rel. Dusenbury *v.* Looker, 111 Mich. 498.

[2] Tucker *v.* Russell, 82 Fed. 263.

[3] Cassell *v.* Lexington, H. & P. Turnpike Co. (Ky.), 9 S. W. 502.

[4] Montana Co. *v.* St. L. Min. & Milling Co., 152 U. S. 160.

[5] Merchant *v.* Webster Land Assn. 56 Minn. 327.

[6] Brown *v.* Mesnard Min. Co., 105 Mich. 653; Brown *v.* Pontiac Min. Co., 105 Mich. 653; Brown *v.* Houghton, Circuit Judge, 105 Mich. 653.

[7] Hunter *v.* Burnsville Pike Co., 56 Ind. 213; Commonwealth *v.* Farmers' and Mechanics' Bank, 21 Pick. 642. See Planters' Bank *v.* Sharp, 5 How. 340.

State officials, an annual statement of its condition.[1] And the legislature may lawfully provide the extreme remedy of dissolving the bank or other corporation, whenever, upon examination by the public inspector, it should be found in an insolvent condition.[2] In the case last cited,[3] it was held that a law was constitutional, which provided for the judicial dissolution of an insurance company, chartered under the laws of the State, whenever the auditor, upon examination of its affairs, should be of the opinion that its financial condition is such as to render its further continuance in business hazardous to those who are insured in the company. In pronouncing the law to be constitutional, the court says: —

"With certain constitutional limitations, the rights of all persons, whether natural or artificial, are subject to such legislative control as the legislature may deem necessary for the general welfare, and it is a fundamental error to suppose there is any difference in this respect between the rights of natural and artificial persons. They both stand precisely upon the same footing. While personal liberty is guaranteed by the constitution to every citizen, yet, by disregarding the rights of others, one may forfeit not only his liberty, but even life itself. So a corporation, by refusing to conform its business affairs as to defeat the objects and purposes of its promoters, and the design of the legislature in creating it, may forfeit the right to further carry on its business, and also its existence as an artificial being. The fact, that the stockholders may be personally injured by declaring a forfeiture of the company's franchises, and causing its affairs to be wound up in a case of this kind, is not a sufficient reason why it should not be

[1] Eagle Ins. Co. of Cincinnati *v.* State, 153 U. S. 446; Insurance Co. *v.* Needles, 113 U. S. 574.

[2] Commonwealth *v.* Farmers' & Mechanics' Bank, 21 Pick. 542; Nevitt *v.* Bank of Port Gibson, 6 Smedes & M. 513; Ward *v.* Farwell, 97 Ill. 593.

[3] Ward *v.* Farwell, *supra*.

done, if the further continuance of its business would be dangerous to the community. In the proper exercise of the police power, laws are often enacted by the legislature for the common good which materially affect the value of certain kinds of property, by which a particular class of persons are injured; yet such consequences do not at all affect the validity of the legislation, and to such losses the maxim *damnum absque injuria* applies. It is generally said one may do as he pleases with his own property, but this is subject to the important qualification — he must please to do with it as the law requires. * * * The maxim *sic utere tuo, ut alienum non lædas*, applies to all such cases. * * *

"These general principles would seem to warrant the conclusion that the legislature is authorized, in the proper exercise of the police power, to adopt such necessary legislation and regulations as will effectually protect the community from losses incident to a public business, conducted by a corporation under a charter from the State, where such business has become hazardous, and will probably result in financial distress and disappointed hopes to those who, ignorant of its condition, do business with it." [1]

As illustrative examples of the scope of police regulation of corporations and of their business, I refer to the following cases of the special regulation of certain corporations.

A Missouri statute provided that, in determining whether the assets of a building and loan association are sufficient to pay the face value of the stock, and to bring the stock to maturity, the average premiums which are paid by the borrowing members of the association should be credited on the stock accounts of the non-borrowing members. The statute was declared to be unconstitutional, so far as it was made to apply to subscription contracts, which were made prior to the enactment of the statute.[2]

[1] Ward *v.* Farwell, 97 Ill. 608, 609.

[2] Fisher *v.* Patton, 134 Mo. 32.

The constitution of Colorado provides that the general assembly shall have power to alter, revoke or annul any charter of a private corporation, "in such manner, however, that no injustice shall be done to the incorporators." It was held that this qualification of the authority to alter or revoke a charter did not make a statute unconstitutional, which, in the exercise of the police power, required a canal corporation to cover over the canal, for the protection of the life and property of the inhabitants of the city, through which the canal was laid.[1]

The regulation of the business of insurance has been extensively treated in preceding sections,[2] to which the reader is referred. Reference is made in the present connection to only a few particular cases. It has been held in Pennsylvania to be constitutional to prohibit by statute an insurance company from making discriminations, in prosecution of the business and the making of contracts of insurance, against certain individuals and in favor of others.[3] So, elsewhere, it has been held to be constitutional to control the terms of a policy of fire insurance, so as to require the insurance company to pay the losses under the policy in full, whatever may be the agreement of the parties to the contrary,[4] and to prohibit insurance companies from denying that the property insured was worth the full amount of the policy, when it was issued.[5] The imposition of a penalty of twelve per cent of the amount recoverable on a policy of insurance, for failure to pay the same when it became due, was likewise held to be a reasonable exercise of the police power.[6]

Telegraph, telephone, electric light and other companies,

[1] Platte & Denver Canal & Milling Co. *v.* Dowell, 17 Colo. 376.
[2] §§ 90, 105.
[3] Commonwealth *v.* Morningstar, 144 Pa. St. 103.
[4] Dugger *v.* Mechanics' &c. Ins. Co., 95 Tenn. 245.
[5] Daggs *v.* Orient Ins. Co. of Hartford, 136 Mo. 382.
[6] Union Cent. Life Ins. Co. *v.* Chowning, 86 Tex. 654.

which, in the prosecution of their business, require the stringing of wires for the transmission of the necessary electrical current, are peculiarly subject to police regulation, in order to protect the public against the nuisance, and the dangers to life and property, which are threatened by the network of wires which now encircle and interlace a large city. The dangers and annoyance are greatest when the wires are overhead, and strung on the unsightly poles which disfigure all of our streets. But the electrolysis of water, sewer and other pipes, by the want of sufficient covering of electrical wires when they are buried in the ground, both justifies and requires police regulation in such cases, as when the wires are strung upon poles above ground. In both cases, the regulations are constitutional, provided they are reasonable, even though conformity to the police regulation may prove both expensive and difficult.[1] It has also been held to be constitutional to prohibit the stretching of wires over the roofs of houses.[2]

Telegraph companies are also subjected to police regulations of their business, in order to insure reasonable accommodations to patrons, and the safe and accurate transmission and delivery of telegraphic messages. These regulations are both reasonable and constitutional.[3] And it has been held to be constitutional for a statute to give to the addressee of a telegram the right to recover a penalty, where the company had failed to deliver the telegram with reasonable dispatch. And it was held that this imposition and recovery of the penalty was not a regulation of interstate commerce, nor did it unconstitutionally impair the obligation of the contract, which the company had made with the sender of the message, that the company was not liable

[1] People *v.* Squire, 107 N. Y. 593; *s. c.* 145 U. S. 175; Western Union Tel. Co. *v.* City of New York, 38 Fed. 552.

[2] Electric Imp. Co. *v.* City and County of San Francisco., 45 Fed. 593; Electric Imp. Co. *v.* Scannell, 45 Fed. 596.

[3] Connell *v.* Western Un. Tel. Co., 108 Mo. 459.

for mistakes in transmission unless the telegram was repeated.[1]

The State or municipality may also impose a tax upon the telegraph companies, doing business within their borders, without laying themselves open to the charge of interfering with interstate commerce. Usually, the tax is rated according to the number of poles which the company may erect within the limits of the city or State; and the Supreme Court of the United States has held that such a tax was rather in the nature of a rental charge for the use of the streets and highways, by the erection of poles and the stringing of wires on them.[2] In imposing a similar license tax upon an electric light company, it was held in Pennsylvania that the tax could not be laid against poles and wires, which were used exclusively in lighting the streets and public places under a contract with the city; but it must be confined to the poles and wires which were employed to furnish light to private consumers.[3]

Wherever privileges are bestowed by statute upon a corporation, the statute may prescribe a return of some equivalent to the public, as a condition precedent to the enjoyment of the privilege; and the acceptance of the benefits of the statute makes it obligatory upon the corporation to perform its duties to the public. These principles were applied in one case to a water company, who was charged, as a condition of its acceptance and enjoyment of the privileges granted to it by statute, with the duty of furnishing free of charge all the water that may be needed by a city for fire purposes, and other public

[1] Western Un. Tel. Co. *v.* Howell, 95 Ga. 194; *s. c.* 162 U. S. 650.

[2] City of St. Louis *v.* West. Un. Tel. Co., 148 U. S. 92; City of Philadelphia *v.* Am. Un. Tel. Co., 167 Pa. St. 406; City of Philadelphia *v.* Postal Tel. Cable Co., 67 Hun, 21.

[3] New Castle *v.* Electric Co., 16 Pa. Co. Ct. 663; 26 Pittsb. Leg. J. (N. S.) 197.

necessities, as the statute had stipulated. The statute was sustained as constitutional.[1]

§ 212. **Laws regulating rates and charges of corporations.** — The right of the legislature, to regulate the rates and charges of a corporation, has frequently been the subject of litigation in the courts of this country. The establishment of extensive and rich corporations, which are often enabled by their combined capital and by the possession of special franchises to make a practical monopoly of the business in which they are engaged, and consequently to demand of those, who are compelled by circumstances to have business dealings with the corporations, extortionate and unequal charges, is deemed to be a full and complete justification of the regulation of prices and charges in such cases. For these reasons, there is a general popular demand for legislative regulation of the rates and charges of the corporations.

The general power of the government to regulate prices has already been fully explained,[2] and the constitutional limitations discussed. It will not be necessary to repeat here what has been stated there. It was ascertained by a study of the cases that where the government, by the grant of a more or less exclusive franchise, increases the economic powers of a person or persons, so as to create a monopoly against those to whom the franchise, is denied it had the power to regulate the charges of such person or persons, so that the public may obtain that reasonable enjoyment of the benefits arising out of the monopoly, which indeed was the consideration or inducement of the grant of the franchise.[3] The Supreme Court of the United States has even gone further in the recognition of the legisla-

[1] City of Boise City *v.* Artesian Hot & Cold Water Co. (Idaho), 39 P. 562.

[2] See *ante*, §§ 96, 97.

[3] See *ante*, § 96.

tive power to regulate prices, and asserted that, when circumstances make of a particular business "a virtual monopoly," the legislature may prevent extortion by the regulation of prices.[1] But in order to justify the legislative regulation of the charges of corporations, it will not be necessary to go to the length of this decision. In the first place, if the power to repeal or amend the charter is reserved to the State, no question can arise; for in the exercise of the power to amend, the legislature may require, as a condition of the continuance of the corporate existence, the observance of whatever police regulation it may see fit to establish, in the same manner, and to the same extent, that it may impose conditions of every sort and kind, in the original grant of the charter. When the power to amend or repeal is not reserved, the question becomes important, whether the corporation may be subjected to this regulation. In regard to police regulations generally, we have seen[2] that the corporation occupies no vantage ground above the individual; that both corporations and natural persons may be subjected to the same regulations under like circumstances; and that the institution of new and more burdensome regulations, after the creation of the corporation, does not constitute any infringement of the corporate rights, provided no attempt is made, under the guise of police regulation, to destroy or impair any of the substantial rights of the corporation. It is, therefore, not difficult, under the principles explained and set forth in a previous section,[3] to justify the regulation of the rates and charges of railroads, turnpikes, telegraph and telephone companies, and other corporations, to which the government has granted some special franchise — to each of the corporations named is given the right to appropriate land in the

[1] Waite, Ch. J., in Munn *v.* Illinois, 94 U. S. 113. See the criticism of this decision in § 96.

[2] See *ante*, § 209.

[3] § 96.

exercise of the right of eminent domain, without which it would be almost impossible to construct their lines or road — for the grant of the franchise made these corporations legal monopolies, as against the public, and consequently they became subject to police regulation, in order to protect the public from extortion. It has been generally held, with only one or two exceptions, that the legislature may regulate the charges of corporations of this kind,[1] and change those regulations at will, unless a contract to maintain a stated rate of charge has been made with the corporation.[2]

But if a State law or railroad commission has established a maximum rate of charge, it has been held that special

[1] Railroads — Chicago, etc., R. R. *v.* Iowa, 94 U. S. 115; Peck *v.* Chicago, etc., R. R., 94 U. S. 164, 176; Union Pacific Ry. *v.* U. S., 99 U. S. 700; Cin., H. & D. R. R. Co. *v.* Cole, 29 Ohio, 125; Iron R. R. Co. *v.* Lawrence Furnace Co., 29 Ohio St. 208; Chicago & Alton R. R. Co. *v.* People ex rel. Koerner, 67 Ill. 11 (16 Am. Rep. 599); Ruggles *v.* People, 91 Ill. 256; Illinois Cent. R. R. Co. *v.* People, 95 Ill. 313; Blake *v.* Winona etc., R. R. Co., 19 Minn. 418 (18 Am. Rep. 345); *s. c.* 94 U. S. 180; Mobile & M. R. R. Co. *v.* Steiner, 61 Ala. 559; Chicago B. & Q Ry. Co. *v.* Jones, 149 Ill. 361; Southern Pac. Ry. Co. *v.* Bd. of R. R. Commissioners, 78 Fed. 236; Smith *v.* Lake Shore & M. S. Ry. Co., 114 Mich. 460; Campbell *v.* Chicago, M. & St. P. Ry. Co., 86 Iowa, 587; State *v.* Southern Pac. Ry. Co., 23 Oreg. 424. *Contra*, Atty.-Gen. *v.* Chicago, etc., R. R. Co., 35 Wis. 425; Philadelphia, etc,, R. R. Co. *v.* Bowers, 4 Houst. 506. Gas and water companies — Spring Valley Waterworks *v.* Schottler, 110 U. S. 347; State *v.* Columbus Gaslight, etc., Co., 34 Ohio St. 216 (32 Am. Rep. 390). Rogers' Park Water Co. *v.* Fergus, 178 Ill. 571, where it was held that the power to regulate the water rates was a continuing one, so that the rates may be changed from time to time, at the will of the legislative power. Ferry companies — Parker *v.* Metropolitan R. R. Co., 109 Mass. 507. Telephone Companies — Hockett *v.* State, 105 Ind. 599. Bridge companies — Commonwealth *v.* Covington & C. Bridge Co. (Ky.), 21 S. W. 1042; Covington & C. Bridge Co. *v.* Commonwealth (Ky.), 22 S. W. 851. Turnpike roads — Covington & L. Turnpike Co. *v.* Sandford, 164 U. S. 578; Winchester & L. Turnpike Road Co. *v.* Croxton, 98 Ky. 739; Louisville & T. Turnpike Road Co. *v.* Boss (Ky.), 44 S. W. 981. A booming company — Proprietors of Machias Boom *v.* Sullivan, 85 Me. 343.

[2] Rogers Park Water Co. *v.* Fergus, 178 Ill. 571.

legislation, establishing a specific price for mileage tickets, will be in excess of the police power of the State.[1]

In Railway Co. *v.* Smith,[2] Justice Peckham characterized such a statute, "as an abitrary enactment in favor of the persons spoken of (those who were able and willing to buy a mileage ticket) who, in the legislative judgment, should be carried at less expense than the other members of the community."

But, as has been very fully explained in a preceding section,[3] the power is now controlled by the judicial requirement, that the regulation of the rates and charges must be reasonable in the stipulation of the maximum.

Whether corporations, which receive no franchise or privilege from the government, may be subjected to State regulation of their charges in the conduct of their business, — for example, a corporation engaged in the flour milling or cotton manufacturing business — depends upon other grounds. Under the principle, established in Munn *v.* Illinois,[4] such a regulation may be easily justified, where the business under peculiar circumstances has become a virtual monopoly. So, also, may a corporation of this kind be subjected to such a regulation, because the very creation of the corporation, which constitutes an authority for the compact combination of the capital of many persons in one business, may be considered a special franchise, increasing the power of those who compose the corporation, over the property and the necessities of others. There has been no need for the regulations of the charges of such corporations, and consequently we have few adjudications upon the subject.[5]

[1] Lake Shore & M. S. Ry. Co. *v.* Smith, 173 U. S. 684; reversing Smith *v.* Lake Shore & M. S. Ry. Co., 114 Mich. 460; Beardsley *v.* N. Y. L. E. & W. Ry. Co. (N. Y. 1900), 56 N. E. 488; reversing *s. c.* 44 N. Y. S. 175.

[2] 173 U. S. 684.

[3] § 97.

[4] 94 U. S. 131.

[5] See *ante*, §§ 96, 97, where the few cases which the authorities had

It has been stated, as the generally accepted doctrine, that the State cannot make a valid contract in limitation of the exercise of its police power.[1] But a disposition is displayed by the authorities to make of the power to regulate the charges of corporations an exception to this general rule, by denying to the legislature the power to regulate such charges by subsequent laws, where the power to do so is denied by the charter, or where the lawful charges are stipulated in the charter. Chief Justice Waite, of the Supreme Court of the United States, expressed the opinion of the court on this point in the following language: —

"This company, in the transaction of its business, has the same rights and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done the charter might have presented a contract against future legislative interference. But it was not and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of the legislators for protection against wrong under the form of legislative regulation." [2]

been able to find are fully discussed. See, also, Deposit Bk. *v.* Daviess County (Ky.), 39 S. W. 1030.

[1] See *ante*, § 210.

[2] Ch. J. Waite in Chicago, etc. R. R. Co. *v.* Iowa, 94 U. S. 155. See, also, Spring Valley Waterworks *v.* Schottler, 110 U. S. 347; Hamilton *v.*

Where the charter or the general laws, under which the corporation has been incorporated, expressly stipulate what shall be the rate of charges which the corporation might make for its services; [1] or the exclusive power to fix its own rates is expressly given to the corporation,[2] there can be very little doubt that a binding contract has been thereby made by the State with the corporation, which, under the decisions already cited, would debar any future regulation of the charges of the corporation. But is a contract, which so operates as a bartering away of the police power of the State, to be inferred from a mere general authorization that the corporation may fix its own rates? All corporate charters, and general laws of incorporation, contain a statement of the general powers of the corporation, which does not amount to a contract that these powers are not subject to any future police regulation; and it would seem to be reasonable to distinguish the cases, in which there is an express stipulation that the corporation shall have the "exclusive" right to fix its own charges, from those cases, in which there is only a general authorization to determine upon the rates of prices and charges. In the latter cases, it would seem to be sound to hold that there was not such a positive

Keith, 5 Bush, 458; Illinois Cent. R. R. Co. *v.* People, 95 Ill. 113; Sloan *v.* Pacific R. R. Co., 61 Mo. 24 (21 Am. Rep. 397); Farmers' Loan, etc., *v.* Stone et al., U. S. C. C. Miss., 18 Cent. L. J. 472; Georgia R. R. and Banking Co. *v.* Smith, 128 U. S. 174; Reagan *v.* Farmers' Loan and Trust Co., 154 U. S. 362; Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339; Covington & L. Turnpike Road Co., *v.* Sandford, 164 U. S. 574; City of Danville *v.* Danville Water Co., 178 Ill. 299; Pingree *v.* Michigan Cent. R. R. Co. (Mich.), 76 N. W. 635; New Orleans Gas Co. *v.* Louisiana Light, etc., Co., 115 U. S. 650; Santa Ana Water Co. *v.* Town of San Buenaventura, 56 Fed. 339.

[1] As in City of Danville *v.* Danville Water Co., 178 Ill. 299; Pingree *v.* Michigan Central R. R. Co. (Mich.), 76 N. W. 635. In the last case, the railroad was given the power to fix its own rates "subject only" to a stipulated maximum rate for passengers.

[2] As in Santa Ana Water Co. *v.* Town of San Buenaventura, 56 Fed. 339.

contract, as would preclude the future police regulation of the rates of charges. It has been so held in two cases.[1]

But where the charter of incorporation is taken subject to the reserved power to amend or repeal, the reserved power of amendment and repeal applies to this contract, that the corporation shall fix its own rates, as well as to any other rights and powers which might have been conferred by the charter.[2]

It has been recently held by the United States Circuit Court that, where corporations have been formed under a general incorporation law, which grants to the corporation the power to fix its own rates, no law will be a constitutional repeal of this authority which is limited in its application to the corporations of a limited locality, which have been formed thereunder. To be an effective and valid repeal of the law, it must apply to all corporations of the class throughout the State.[3] The facts of this case were these: The general law of the State of Indiana for the incorporation of street railways throughout the State, gave by express provision to the railways incorporated thereunder the right to determine its rates of fare, but the power to amend or repeal any part of the law was expressly reserved. Subsequently, the legislature undertook to reduce the fares on street railways in cities of the first class, in which there was only one city, Indianapolis, to three cents. The Supreme Court of the State sustained the subsequent statute,

[1] State *v.* Southern Pac. Ry. Co., 23 Oreg. 424; Commonwealth *v.* Covington & C. Bridge Co. (Ky.), 21 S. W. 1042; Commonwealth *v.* Covington & C. El. Ry. & Bridge & Transfer Co. (Ky.), 21 S. W. 1042; Covington & C. Bridge Co. *v.* Commonwealth (Ky.), 22 S. W. 851.

[2] Beardsley *v.* New York L. E. & W. Ry. Co., 15 App. Div. 251; 44 N. Y. S. 175; City of Indianapolis *v.* Navin, 151 Ind. 139; Columbus Ins. & Banking Co. *v.* First Nat. Bank, 73 Miss. 96; Sweetzer *v.* First Nat. Bank, 73 Miss. 96. In the last two cases, the authorization in the charters of the banks, of the power to charge any rate of interest which they may determine, was held to be subject to repeal by subsequent legislation.

[3] Central Trust Co. *v.* Citizens St. Ry. Co., 82 Fed. 1.

holding that it was not a special act, in violation of the constitutional prohibition of special laws.[1] But the United States Circuit Court held the statute to be unconstitutional on the ground, as stated above, that, since the statutory contract for exemption of the street railways from the regulations of its rates of fares was applicable to all the street railways throughout the State, the contract cannot be abrogated by any law which has a narrower application.

But, even when there is no contract in the way of the exercise by the legislature of the power to regulate the prices and charges of corporations, there is always the one unvarying limitation, that the rates which may be fixed by the legislature must not be so low, that the reasonable profits of the corporate business will be taken away. Where such a practical confiscation of the profits results from the legislative regulation of the rates of charges, the courts will unhesitatingly declare the regulation to be void and unconstitutional, as an interference with vested rights.[2]

Similar principles induced the Supreme Court of Kentucky to hold an act of the legislature unconstitutional, which authorized a turnpike company to charge toll of the citizens of a town, from which they were exempted by a provision of the charter of the turnpike company. This abrogation of the privilege of exemption of these citizens from the payment of the toll, was held to be unjustifiable as an exercise of the police power.[3]

[1] City of Indianapolis *v.* Navin, 151 Ind. 139.

[2] Cleveland Gaslight & Coke Co. *v.* City of Cleveland, 71 Fed. 610; Milwaukee Electric Ry. & Light Co. *v.* City of Milwaukee, 87 Fed. 577; Central Trust Co. of N. Y. *v.* City of Milwaukee, 87 Fed. 577; San Joaquin & King's River & Canal Irrigation Co. *v.* Stanislaus County, 90 Fed. 516; Ball *v.* Rutland Ry. Co., 93 Fed. 573. See, also, *ante*, § 97, in which this principle is fully explained, in connection with the general discussion of the subject of the regulation of prices and charges.

[3] Louisville & T. Turnpike Road Co. *v.* Boss (Ky.), 44 S. W. 981.

§ 213. **Regulation of foreign corporations.** — It is provided by the United States constitution [1] that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States;" and, under this clause of the constitution, the citizen of one State is protected against any discrimination, in another State between himself and the citizens of the latter State. He is entitled to the equal enjoyment of the privileges of the citizen, and any arbitrary discrimination between him and the citizen of the latter State, in the matter of police regulations, would be in violation of this constitutional provision. But corporations are not considered to be citizens within the operation of this guaranty. The legal existence of a corporation is confined to the territory of the State, which brings the corporation into existence. The corporations of one State are not entitled to the privileges or immunities of the citizens of the several States; and, consequently, they cannot claim the right to transact business in any other State but the one in which they were created.[2] If they are permitted to exercise their corporate powers in any other State, it is a privilege and not a guaranteed right. A State may, without violating any provision of the constitution of the United States, prohibit altogether the doing of business

[1] U. S. Const., Art. IV., § 2, cl. 1.

[2] See State *v.* Del. & A. Tel. & Telephone Co., 7 Houst. 269; Daggs *v.* Orient Ins. Co. of Hartford, Conn., 136 Mo. 382. But it has been held in some cases, while confirming the proposition that a foreign corporation is not a citizen in the constitutional sense, and that it may be excluded from the prosecution of its business within a State, or admitted upon the most arbitrary or discriminating terms, that the statute, imposing these arbitrary and discriminating terms, must be confined in its application to corporations. If it is applied to individuals or natural persons, under the description of firms or unincorporated associations, the statute is in so far void and unconstitutional, because it contravenes the constitutional guaranty of equal privileges and immunities to the citizens of all the States. Barnes *v.* People, 168 Ill. 425; State *v.* Stone, 118 Mo. 388; State ex rel. Hoadley *v.* Board of Insurance Commissioners, 37 Fla. 564.

by foreign corporations within its territory; and if the privilege is granted, it may be coupled with all sorts of conditions, the performance of which constitutes a condition precedent to the enjoyment of the privilege; and these requirements will not be open to constitutional objection, because they are not made applicable to domestic corporations.[1] Thus, it has been held to be constitutional for a State law to require a foreign corporation, before it can lawfully do business within the State, to procure a license from the State officials, and to fulfill the conditions precedent to the procurement of the license;[2] to open and maintain an office within the State, in the charge of a resident agent, upon whom process against the corporation may be served;[3] and to pay a license or franchise tax to the State or municipality, or to both;[4] to require fire insurance com-

[1] Liverpool Ins. Co. *v.* Mass., 1 Wall. 506; Bank of Augusta *v.* Earle, 13 Pet. 519; Blacke *v.* McClung, 172 U. S. 239; In re Application of Peter Schoenhofer Brewing Co., 8 Pa. Super. Ct. 141; Purdy *v.* N. Y. & N. H. R. R. Co., 61 N. Y. 353; Tatem *v.* Wright et al., 23 N. J. L. 429; Slaughter *v.* Commonwealth, 13 Gratt. 767; Osborn *v.* Mobile, 44 Ala. 493; Commonwealth *v.* Milton, 12 B. Mon. 212; People *v.* Thurber, 13 Ill. 554; Wood Mowing Machine Co. *v.* Caldwell, 54 Ind. 270 (23 Am. Rep. 641); Am. Union Tel. Co. *v.* W. U. Tel. Co., 67 Ala. 26 (42 Am. Rep. 90); Caldwell *v.* Armour (Del. Super.), 43 Atl. 517. See, *contra*, Pyrolunite Manganese Co. *v.* Ward, 73 Ga. 491. It is very common to subject foreign insurance companies to special and strict police regulations. Exempt Firemen's Fund *v.* Roome, 93 N. Y. 313 (45 Am. Rep. 217); Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15 (21 Am. Rep. 89); Cincinnati M. H. Assurance Co. *v.* Rosenthal, 55 Ill. 85 (8 Am. Rep. 626); Pierce *v.* People, 106 Ill. 11 (46 Am. Rep. 683); Fire Department of Milwaukee *v.* Helfenstein, 16 Wis. 136. See Doyle *v.* Ins. Co., 94 U. S. 535; Goodrel *v.* Kreichbaum, 70 Iowa, 362; State *v.* Phipps, 50 Kans. 609.

[2] Pembina Con. Silver M. & M. Co. *v.* Pennsylvania, 125 U. S. 181; Goodrell *v.* Kreichbaum, 70 Iowa, 362.

[3] St. Louis A. & T. Ry. Co. *v.* Fire Assn. of Philadelphia, 60 Ark. 325.

[4] Pembina Con. Silver M. & M. Co. *v.* Pennsylvania, 125 U. S. 181; People *v.* Wemple, 131 N. Y. 64; State *v.* Underground Cable Co. (N. J.), 18 A. 581; Honduras Commercial Co. *v.* State Board of Assessors, 54 N. J. L. 278; McClellan *v.* Pettigrew, 44 La. Ann. 356; Southern Building & Loan Assn. of Knoxville *v.* Norman (Ky.), 32 S. W. 952;

panies to pay to the fire department of a city a stated percentage of the premiums they receive;[1] and to require any foreign corporation to deposit funds with the State authorities, in order to secure the payment of claims which citizens may have or acquire against it.[2] It is even permissible for the State legislature to provide for the exaction of a penalty from any agent of a foreign corporation (in this case it was an insurance company), who shall act without authority from the State, although the contract is made out of the State, and provides that he shall be deemed the agent of the other party to the contract.[3] In these cases, it is held that the exaction of an arbitrary license of, and the imposition of extraordinary conditions upon, the resident agents of foreign corporations, involve no infringement of the personal rights of the agents, as citizens of the State or of the United States.

But a foreign corporation cannot be taxed for the purchase of raw material, which is shipped from the taxing State

Moline Plow Co. *v.* Wilkinson, 105 Mich. 57; Western Union Tel. Co. *v.* City of Fremont, 39 Neb. 692.

[1] Fire Department of City of New York *v.* Stanton, 159 N. Y. 225; aff'g 28 App. Div. 334; 51 N. Y. S. 242.

[2] People *v.* Granite State Provident Assn., 58 N. Y. S. 510; 41 App. Div. 257.

[3] Pierce *v.* People, 106 Ill. 11 (46 Am. Rep. 683). See, also, Paul *v.* Virginia, 8 Wall. 168; Hooper *v.* California, 155 U. S. 648; Hickman *v.* State, 62 N. J. L. 499; McClellan *v.* Pettigrew, 44 La. Ann. 356, wherein the license tax was exacted of the resident agent of the foreign corporation. And see State ex rel. Crow *v.* Fireman's Fund Ins. Co. (Mo. '99), 52 S. W. 595, wherein the court sustained the constitutionality of the forfeiture of the licenses to insurance companies, because of their violation of the Missouri anti-trust law, in maintaining a combination through their local agents to fix the rates of insurance. But see, *contra* to the text, Shaw Piano Co. *v.* Ford (Tex. Civ. App.), 41 S. W. 198. In this case, a foreign corporation, through an agent, sold a piano stored within the State, without having taken out any permit, as required by the statute. The notes, given in payment of the price, were made payable to the foreign corporation. It was held that it could recover on them, for the reason that they represented the results of an interstate transaction.

to the native State of the corporation for manufacture, for that cannot be considered a "doing of business within the commonwealth."[1] And it has likewise been held that a statute is unconstitutional, which requires foreign corporations to file certificates of their articles of incorporation, as a condition precedent to their transaction of business within the State.[2]

Most of the State laws, which provide that foreign corporations shall comply with the prescribed conditions precedent before they will be authorized to do business within the State, declare that any contracts, which they may make before they have complied with the requirements of the statute, shall be void and of no effect, so that no suit in the enforcement of them can be maintained in the State courts. The enforcement of this penalty may in the discretion of the legislature be waived by subsequent legislation, validating the otherwise void contracts, without in any constitutional sense interfering with the vested rights of the other parties to the contracts.[3]

One of the practical effects, which the laws for the regulation of foreign corporations almost universally aim to secure, is the provision for bringing such foreign corporations within the jurisdiction of the State courts, and the recovery of absolute judgments against such corporations. Before such suits *quasi in personam* may be entertained against a foreign corporation, doing business within the State, personal service must be made upon some one within the State, who may accept such service as the representative of the foreign corporation. The usual provision is that a corporation, in entering into the transaction of

[1] Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119.

[2] Lyon-Thomas Hardware Co. *v.* Reading Hardware Co. (Tex. Civ. App., 21 S. W. 300; Bateman *v.* Milling Co., 1 Tex. Civ. App. 90; American Starch Co. *v.* Bateman (Tex. Civ. App.), 22 S. W. 771; Gunn v. White Sewing Machine Co., 57 Ark. 24.

[3] Butler *v.* United States Sav. & Loan Co. (Tenn.), 37 S. W. 385; Mutual Benefit L. Ins. Co. *v.* Winne (Mont.), 49 P. 446.

business within the State, is properly served with notice when the process is served upon a resident agent of the corporation. The agent who is served must at the time of service be in the employment of the corporation, and must at the time be engaged with its affairs.[1] The rights and privileges which a foreign corporation acquires under a license to do business within the State, is not a contract in the constitutional sense, so that the license may not be revoked or amended by subsequent legislation. The license may be amended or revoked altogether,[2] as long as the revocation or amendment of the license may not be given a retroactive effect, so as to invalidate any transactions which were entered into, prior to the enactment of the amendatory law;[3] or to impose extra burdens upon, or otherwise affect injuriously, the rights of contract of existing creditors of the corporation.[4]

So, also, a regulation of a foreign corporation, which has the direct effect of discriminating against the citizens of another State, will be void because it violates the constitutional guaranty to the citizens of all the States of equal privileges and immunities in each State. Thus, a State statute, which provides that, in case of insolvency of a foreign corporation, the creditors, resident within the State, shall

[1] St. Clair *v.* Cox, 106 U. S. 350. See Connecticut Mut. Life Ins. Co. *v.* Spratley, 99 Tenn. 322; *s. c.* 172 U. S. 602.

[2] Hartford Fire Ins. Co. *v.* Raymond, 70 Mich. 485; Connecticut Mut. Life Ins. Co. *v.* Spratley, 99 Tenn. 322; *s. c.* 172 U. S. 602; Sandall *v.* Atlanta Mut. Life Ins. Co. (S. C.), 31 S. E. 230; Aetna Standard Iron & Steel Co., 1 Ohio L. D. 180; 1 Ohio C. D. 142.

[3] American Building & Loan Assn. *v.* Rainbolt, 48 Neb. 434.

[4] New York L. E. & W. Ry. Co. *v.* Commonwealth, 153 U. S. 628; *s. c.* 150 Pa. St. 234. In this case, the State statute required the foreign railroad corporations, whose lines extended through Pennsylvania, to collect for the State a certain tax upon that part of its bonded indebtedness, which is held by residents of the State, and to deduct the same from the interest on such bonds. The statute was held to be unconstitutional, so far as it was applied to existing bonds of the corporation, which were issued under the authority of the domicile of the corporation and upon which the interest was alone payable at the home office of the company.

have, in the distribution of the assets found within the State, priority over the claims of non-resident creditors, was declared to be an unconstitutional discrimination against foreign creditors.[1] But it has been held very recently in New York, that the section of the State banking law, which requires foreign corporations, doing business within the State under its provisions, to deposit funds with a State official for the exclusive protection of resident creditors, who shall in case of insolvency of the foreign corporation have a prior lien upon such funds, is a valid regulation, and does not contravene any constitutional provision.[2]

A foreign corporation cannot be denied the right to sue in the courts of the State, on contracts made within the State for the sale of goods manufactured outside of the State, if the contracts themselves are valid and beyond the jurisdiction of the State, under the constitutional prohibition of the regulation of interstate commerce.[3] In the absence of special regulations, whenever a corporation does business in another State, it is so far considered a corporation of that State as to be amenable to its ordinary police regulations.[4]

§ 214. **Regulations of railroads.** — The police regulation of the management of railroads is extremely common and varied; and, consequently, the exercise of police power over them has more frequently been the subject of litigation. But there is no more need for a judicial determination of the limitations upon police power in this phase of its exercise, than in any other. The same principles govern its exercise in every case. Every one, whether a

[1] Blake *v.* McClung, 172 U. S. 239; Maynard *v.* Granite State Provident Assn., 92 Fed. 435; 34 C. C. A. 438.

[2] People *v.* Granite State Provident Assn. (N. Y. 1900), 55 N. E. 1053; affg. *s. c.* 55 N. Y. S. 510; 41 App. Div. 257.

[3] Hargraves Mills *v.* Harden, 56 N. Y. S. 937; 25 Misc. Rep. 665.

[4] Peik *v.* Chicago, etc., R. R. Co., 94 U. S. 164; Milnor *v.* N. Y., etc., R. R. Co., 53 N. Y. 164; McGregor *v.* Erie Railway, 35 N. J. L. 115.

corporation or a natural person, must so enjoy and make use of his rights as not to injure another; and the State may institute whatever reasonable regulations may be necessary to prevent injury to the public or private persons. Here, as elsewhere, however, the exercise of police power must be confined to those regulations which may be needed, and which do actually tend, to prevent the infliction of injury upon others. And it is a judicial question whether a particular regulation is a reasonable exercise of police power. The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the legislature; but whether a given regulation is a reasonable restriction upon personal rights is a judicial question.[1]

[1] "What are reasonable regulations, and what are the subjects of police powers must necessarily be judicial questions. The law-making power is the sole judge when the nec ssity exists, and when, if at all, it will exercise the right to enact such laws.

"Like other powers of government, there are constitutional limitations to the exercise of the police power. The legislature cannot, under the pretense of exercising this power, enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the court to declare such legislation void.

"An ordinance of the city which required a railroad to keep flagman by day and red lantern by night at a certain street crossing, when the company had only a single track, over which only its usual trains passed, and where it did not appear that the crossing was unusually dangerous, or more so than ordinary crossings, was held not to be a reasonable requirement, and therefore within the constitutional limitation on the exercise of the police power.

"A regulation that would require a railroad to place a flagman at such places where danger to public safety, in judgment of prudent persons, might be apprehended at any time, would be a reasonable one." Toledo, etc., R. R. *v.* Jacksonville, 67 Ill. 37. See, also, Chicago & Alton R. R. Co. *v.* People, 67 Ill. 11; State *v.* East Orange, 12 Vroom, 127; City of Erie *v.* Erie Canal Co., 59 Pa. St. 174; Phila. W. B. R. R. Co. *v.* Bowers, 4 Houst. 506; Ladd *v.* Southern C. P. & M. Co., 53 Tex. 172; Sloan *v.* Pac. R. R. Co., 61 Mo. 24.

A disposition is manifested in some of the cases to claim for the railroad company the application of the same rule of reasonableness, as would be applicable to regulations of the private property of individuals; that is, prohibiting all regulations of railroads and of their property, which would not be applicable generally to the private property of individuals. But the reasonableness or unreasonableness of a police regulation is subject to variation with a change of circumstances, and in the character of the subject of the regulation. A regulation may be reasonable when directed against the use of certain kinds of property, while it would be unreasonable, if applied to other and different kinds of property, the enjoyment or use of which does not threaten the injury, against which the regulation was directed. But there can be no doubt that a corporation cannot be subjected to a regulation, which would not be applicable to a natural person under like circumstances. The police regulations resemble greatly the regulation of the use of the common highways, and a comparison of them, as set forth in the following language of a distinguished judge, will assist in reaching a clear understanding of the scope of police power in the regulation of railroads. In Chicago, B. & Q. R. R. Co. *v.* Attorney-General of Iowa,[1] Dillon, J., says: —

"In all civilized countries the duty of providing and preserving safe and convenient highways to facilitate trade and communication between different parts of the State or community is considered a governmental duty. This may be done by the government directly, or through the agency of corporations created for that purpose. The right of public supervision and control over highways results from the power and duty of providing and preserving them. As to ordinary highways these propositions are unquestioned. But it is denied that they apply to railways built by private capital, and owned by private corporations created for the

[1] 9 West. Jur. 347.

purpose of building them. Whoever studies the nature and purposes of railways constructed under the authority of the State by means of private capital will see that such railroads possess a twofold character. Such a railway is in part public and in part private. Because of its public character, relation and uses, the judicial tribunals of this country, State and national, have at length settled the law to be that the State, to secure their construction, may exert in favor of the corporation authorized by it to build the road both its power of eminent domain and of taxation. This the State cannot do in respect of occupations or purposes private in their nature. * * * In its public character a railroad is an improved highway, or means of more rapid and commodious communication, and its public character is not divested by the fact that its ownership is private. * * * In its relations to its stockholders, a railroad, or the property in the road and its income is private property, and, subject to the lawful or reserved rights of the public, is invested with the sanctity of other private property. The distinction here indicated marks with general accuracy the extent of legislative control, except where this has been surrendered or abridged by a valid legislative contract. Over the railway as a highway, and in all its public relations, the State, by virtue of its general legislative power, has supervision and control; but over the rights of the shareholders, so far as these are private property, the State has the same power and no greater than over other private property." [1]

[1] "We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police, which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their roads to come to a stand before passing draws in bridges;

For the further and more expeditious regulation of railroads, particularly in their relation to their patrons, the States throughout the Union, as well as the Federal government, have created boards of railroad commissioners; their powers of supervision varying with the provisions of each statute. One unvarying distinction, however, is that the national, or United States railway commission, has supervision over the railroads in their relations to interstate commerce only, while the States' boards of railway commissioners control the relations of the railroads with intrastate commerce, and with the State governments, as the residuary depositary of the police power of the government. The maintenance of these commissions involves considerable expense; and the legislature of South Carolina imposed by statute the entire expenses of their State railway commission upon the railroads operating within the

or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And since the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards, as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

"There would be no end of illustrations upon this subject, which in detail are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running roads with a single track, using improper rails, not using proper precautions by way of safety beams in case of the breaking of axle trees, number of brakemen upon train with reference to number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be." Thorpe *v.* Rutland, etc., R. R., 27 Vt. 140. See, also, Richmond, F. & P. R. R. Co. *v.* City of Richmond, 26 Gratt. 83; *s. c.* 96 U. S. 521; People *v.* Boston, etc., R. R. Co., 70 N. Y. 569; State *v.* East Orange, 12 Vroom, 127; Phila., W. & B. R. R. Co. *v.* Bowers, 5 Houst. 506; Cin. H. & D. R. R. Co. *v.* Sullivan, 32 Ohio St. 152; Pittsburg, C. & St. L. R. R. Co. *v.* Brown, 67 Ind. 45 (33 Am. Rep. 73); Toledo, W., etc., R. R. Co. *v.* Jacksonville, 67 Ill. 37; Galveston, etc., R. R. Co. *v.* Gierse, 51 Tex. 189.

State. The constitutionality of this statute was contested by the railroad on the ground that it was a taking of private property without due process of law. But the United States Supreme Court united with the Supreme Court of South Carolina, in sustaining the constitutionality of the statute.[1]

As has already been intimated, the number of police regulations of railroads is very great, and the character of them is as varied. For the purpose of illustrating the scope of these regulations, it will only be necessary to refer to the more important ones, which have been passed upon by the courts.

For example, in the exercise of the ordinary police power of the State, it has been held to be reasonable to require all railroads to fence their tracks, not alone for the protection of the live stock of the abutting owners. Indeed, the chief object of the statute is probably to protect the traveling public against accidents, occurring through collision of trains with cattle.[2] One exercise of the power to require railroads to fence their tracks does not preclude a second regulation of the same kind, providing for other and differ-

[1] Charlotte C. & A. Ry. Co. *v.* Gibbes, 142 U. S. 386; *s. c.* 27 S. C. 385.

[2] Minneapolis & St. L. Ry. Co. *v.* Emmons, 149 U. S. 364; Minneapolis & St. L. Ry. Co. *v.* Nelson, 149 U. S. 368; Sawyer *v.* Vt., etc., R. R. Co., 105 Mass. 196; Wilder *v.* Maine Cent. R. R. Co., 65 Me. 332; Smith *v.* Eastern R. R. Co., 35 N. H. 356; Bulkley *v.* N. Y., etc., R. R. Co., 27 Conn. 497; Bradley *v.* Buffalo, etc., R. R. Co., 34 N. Y. 429; Penn. R. R. Co. *v.* Riblet, 66 Pa. St. 164 (5 Am. Rep. 360); Thorpe *v.* Rutland, etc., R. R. Co., 27 Vt. 140; Indianapolis, etc., R. R. Co. *v.* Marshall, 27 Ind. 300; New Albany, etc., R. R. Co. *v.* Tilton, 12 Ind. 10; Indianapolis, etc., R. R. Co. *v.* Kercheval, 16 Ind. 84; Toledo, etc., R. R. Co. *v.* Fowler, 22 Ind. 316; Indianapolis, etc., R. R. Co. *v.* Parker, 29 Ind. 471; Ohio & Miss. R. R. Co. *v.* McClelland, 25 Ill. 140; Gorman *v.* Pac. R. R. Co., 26 Mo. 441; Jones *v.* Galena, etc., R. R. Co., 16 Iowa, 6; Winona, etc., R. R. Co. *v.* Waldron, 11 Minn. 575; Blewett *v.* Wyandotte, etc., R. R. Co., 72 Mo. 583; Kan. Pac. Ry. Co. *v.* Mower, 16 Kan. 573; Mo. Pac. Ry. Co. *v.* Harrelson, 44 Kans. 252; Louisville & Nashville R. R. Co. *v.* Burke, 6 Caldw. 45. But see, *contra*, Ohio & M. Ry. Co. *v.* Todd (Ky.), 15 S. W. 56.

ent fences.[1] And the railroad company can not relieve itself from the obligation to erect and maintain the fence by any contracts with the abutting owners.[2] The railroad company is, of course, liable for whatever injury is done to persons or property, in consequence of any neglect in maintaining the fence.[3]

In the absence of special legislation, the judgment will be confined to the recovery of the actual damages which have been suffered in consequence of the neglect. But the statute may constitutionally make the company liable for double the value of the stock killed by reason of the neglect to properly maintain the fences. This requirement is justified on the same grounds, as is the authority to recover exemplary or punitory damages.[4] And it may also be pro-

[1] Gillam *v.* Sioux City, etc., R. R. Co., 26 Minn. 268. It has also been held to be a constitutional exercise of the police power to require the railroads to maintain fences of sufficient height and strength, to effectually keep cattle from straying upon the tracks. Beckstead *v.* Montana Union Ry. Co. (Mont.), 47 P. 795. And, so, likewise, to require the erection of cattle guards, whenever the adjoining landowner demands them. Birmingham Mineral Ry. Co. *v.* Parsons, 100 Ala. 662.

[2] New Albany, etc., R. R. Co. *v.* Tilton, 12 Ind. 3; New Albany, etc., R. R. Co. *v.* Maiden, 12 Ind. 10. See Poler *v.* N. Y. Cent. R. R. Co., 16 N. Y. 476; Shepherd *v.* Buffalo, N. Y. & Erie R. R. Co., 35 N. Y. 641.

[3] As to what degree of care is required of railroads in this connection, see Chicago, etc., R. R. Co. *v.* Barsie, 55 Ill. 226; Antisdel *v.* Chicago, etc., R. R. Co., 26 Wis. 145; Lemmon *v.* Chicago, etc., R. R. Co., 32 Iowa, 151. It has been held not to be a taking of property without due process of law for a statute to allow damages for the diminution of value in a farm, which results from the failure of the company to fence its road, and to construct proper cattle-guards. Minneapolis & St. L. Ry. Co. *v.* Emmons, 149 U. S. 364; Minneapolis & St. L. Ry. Co. *v.* Nelson, 149 U. S. 368. A repeal by statute of a provision of the charter of a railroad, that all suits for damages done by the trains to stock must be brought within six months after the infliction of the damage, does not in a constitutional sense impair the obligation of a contract. Louisville & N. Ry. Co. *v.* Williams (Ky.), 45 S. W. 229.

[4] Cairo, etc., R. R. Co. *v.* People, 92 Ill. 97 (34 Am. Rep. 112); Barnett *v.* Atlantic, etc., R. R. Co., 68 Mo. 56 (30 Am. Rep. 773); Spealman *v.* Railroad Co., 71 Mo. 434; Humes *v.* Mo. Pac. R. R. Co., 82 Mo. 22 (52 Am. Rep. 369); Tredway *v.* Railroad Co., 43 Iowa, 527; Welsh *v.* Chi-

vided by statute that the railroad company may be held liable for all losses of property, occurring in consequence of the neglect of the railroad in the maintenance of the fences, although the owner may be guilty of contributory negligence.[1]

But there must be some violation of the law, or some act of negligence, on the part of the railroad company, in order that the company may be held liable for damages suffered from the running of trains.[2] A statute, which makes a railroad responsible "for all expenses of the coroner and his inquest, and of the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise," is, therefore, properly declared to be unconstitutional, so far as it is applied to cases of loss, in which the

cago, B. & Q. R. R. Co., 53 Iowa, 632; Little Rock & Ft. Scott R. R. Co. *v.* Payne, 33 Ark. 816 (34 Am. Rep. 55). *Contra*, Madison, etc., R. R. Co. *v.* Whiteneck, 8 Ind. 217; Indiana Cent. R. W. Co. *v.* Gapen, 10 Ind. 292; Atchison & Neb. R. R. Co. *v.* Baty, 6 Neb. 37 (29 Am. Rep. 356); Grand Island & W. C. Ry. Co. *v.* Swinbank, 51 Neb. 521; Rio Grande W. Ry. Co. *v.* Vaughn, 3 Colo. App. 465; Rio Grande W. Ry. Co. *v.* Whitson, 4 Colo. App. 426; 36 P. 159; Denver & R. G. Ry. Co. *v.* Outcalt, 2 Colo. App. 443; 31 P. 177; Denver & R. G. Ry. Co. *v.* Davidson, 2 Colo. App. 443; 31 P. 181; Denver & R. G. Ry. Co. *v.* Baker, 2 Colo. App. 443; 31 P. 181.

[1] Corwin *v.* N. Y. & Erie R. R. Co., 13 N. Y. 42; Horn *v.* Atlantic, etc., R. R. Co., 35 N. H. 169; O'Bannon *v.* Louisville, etc., R. R. Co., 8 Bush, 348; Jeffersonville, etc., R. R. Co. *v.* Nichols, 30 Ind. 321; Jeffersonville, etc., R. Co. *v.* Parkhurst, 34 Ind. 501; Illinois Cent. R. R. Co. *v.* Arnold, 47 Ill. 173; Hinman *v.* Chicago, etc., R. R. Co., 28 Iowa, 491; Quackenbush *v.* Wis. & N. Ry. Co., 71 Wis. 472.

[2] Birmingham Mineral Ry. Co. *v.* Parsons, 100 Ala. 662; Denver & R. G. Ry. Co. *v.* Outcalt, 2 Colo. App. 443; 31 P. 177; Denver & R. G. Ry. Co. *v.* Davidson, 2 Colo. App. 443; Denver & R. G. Ry. Co. *v.* Baker, 2 Colo. App. 443; Rio Grande & W. Ry. Co. *v.* Witson, 4 Colo. App. 426; Wadsworth *v.* Union Pac. Ry. Co., 18 Colo. 600; Union Pac. Ry. Co. *v.* Kerr, 19 Colo. 273; Schenck *v.* Union Pac. Ry. Co. (Wyo.), 40 P. 840; Caterill *v.* Union Pac. Ry. Co., 2 Idaho, 540; Jansen *v.* Union Pac. Ry. Co., 6 Utah, 253; Jolliffe *v.* Brown, 14 Wash. 155 (44 P. 149). In State *v.* Divine, 98 N. C. 778, the statute, which was declared to be unconstitutional, only made the killing of live stock by the locomotive *prima facie* evidence of negligence.

company has not been guilty of negligence, or of a violation of some legal duty.[1] And where there is no statutory obligation on the railroad to maintain fences along its lines, the general principles of the law as to penning up of cattle prevail, and make a statute unconstitutional, which imposes upon a railroad the responsibility for injury to cattle.[2]

On the same general principles, statutes are sustained as constitutional which impose upon the railroad companies liability for all injuries to property, which have been occasioned by fires, set or caused by their locomotives.[3] And some of these cases hold that it is not unconstitutional to impose upon the railroads an absolute liability for damages from fires, irrespective of the question of negligence, and in the absence of all proof of negligence.[4] Of the same character, but not so severe upon the railroads, is the State

[1] Ohio & Mississippi R. R. Co. *v.* Lackey, 78 Ill. 55 (20 Am. Rep. 259). But see Pennsylvania R. R. Co. *v.* Riblet, 66 Pa. St. 164 (5 Am. Rep. 360), in which it was held to be competent for the legislature to compel an existing railroad to repair all fences along its route that may be destroyed by fire from its engines. See, to the same effect, Lyman *v.* Boston, etc., R. R. Co., 4 Cush. 288; Gorman *v.* Pac. R. R. Co., 26 Mo. 441; Rodemacher *v.* Milwaukee, etc., R. R. Co., 41 Iowa, 297 (20 Am. Rep. 592).

[2] Sweetland *v.* Atchison, T. & S. F. Ry. Co. (Colo.), 43 P. 1006; Wadsworth *v.* Union Pac. Ry. Co., 18 Colo. 600; Jolliffe *v.* Brown, 14 Wash. 155; 44 P. 149; Navigation Co. *v.* Smalley, 1 Wash. 206.

[3] St. Louis & S. F. Ry. Co. *v.* Mathews, 161 U. S. 1; Mathews *v.* St. Louis & S. F. Ry. Co., 121 Mo. 298; Campbell *v.* Mo. Pac. Ry. Co., 121 Mo. 340; Lumberman's Mut. Ins. Co. *v.* Kansas City, Ft. S. & M. Ry. Co., 149 Mo. 165; McCandless *v.* Richmond & D. Ry. Co., 38 S. C. 103; Mobile Ins. Co. *v.* Columbia & Greenville Ry. Co., 41 S. C. 408; Lipfeld *v.* Charlotte C. & A. Ry. Co., 41 S. C. 285; Union Pac. Ry. Co. *v.* DeBusk, 12 Colo. 294; Union Pac. Ry. Co. *v.* Arthur, 2 Colo. App. 159; Union Pacific Ry. Co. *v.* Tracy, 19 Colo. 331; Lake Erie & W. Ry. Co. *v.* Falk, 16 Ohio, C. C. 125; Baltimore & Ohio R. R. Co. *v.* Kreager (Ohio), 56 N. E. 203; Cleveland L. & W. Ry. Co. *v.* Ringley, *id.*, Lake Erie & W. Ry. Co. *v.* Falk, *id.*

[4] McCandless *v.* Richmond & D. Ry. Co., 38 S. C. 103; Lipfeld *v.* Charlotte, C. & A. Ry. Co., 41 S. C. 285; Campbell *v.* Mo. Pac. Ry. Co., 121 Mo. 340.

regulation, that the setting fire to property by a passing locomotive is *prima facie* evidence of the negligence of the railroads. The statute in question was sustained as a constitutional exercise of the police power by the Supreme Court of Illinois.[1] A Maine statute, in imposing this extraordinary liability for fires upon the railroads, provides that the railroads shall become subrogated to the rights of the property owner in and to any fire insurance which may cover the property, which has been destroyed by the locomotive fires; and if the owner has already recovered on the policy, the amount he has received from the insurance company will be deducted from the amount of damages, which has been assessed against the railroad. The constitutionality of the statute has been sustained.[2]

Laws which modify the common law, so as to make railroads liable to their employees for injuries sustained through the negligence of their fellow-servants, have also been sustained.[3]

It has also been held to be constitutional to provide by statute that, in all actions against railroads for injuries to stock or other property, resulting from the operation of the trains, a certain attorneys' fee shall be recoverable of the railroad as a part of the damages.[4] But the contrary ruling has been made as to this special allowance of attorneys' fees by the Supreme Court of the United States,[5] and also by the Supreme Court of Michigan, on the ground that it

[1] Baltimore & Ohio S. W. Ry. Co. *v.* Tripp, 175 Ill. 251.

[2] Leavitt *v.* Canadian Pac. Ry. Co., 90 Me. 153; Choctaw, O. & G. Ry. Co. *v.* Alexander (Okl.), 52 P. 944.

[3] Mo. Pac. Ry. Co. *v.* Mackey, 127 U. S. 205; Minneapolis & St. L. Ry. Co. *v.* Herrick, 127 U. S. 210; Pittsburg, C. C. & St. L. Ry. Co. *v.* Montgomery, 152 Ind. 1.

[4] Peoria &c. R. R. Co. *v.* Duggan, 109 Ill. 537 (50 Am. Rep. 619); Perkins *v.* St. Louis, I. M. & S. Ry. Co., 103 Mo. 52; Briggs *v.* St. Louis, I. M. & S. Ry. Co., 111 Mo. 168; Atchison T. & S. F. Ry. Co. *v.* Mathews, 58 Kans. 447; Gulf, C. & S. F. Ry. Co. *v.* Ellis, 87 Tex. 19.

[5] Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150; reversing *s. c.* 87 Tex. 19.

was special legislation which is inhibited by the constitution.[1]

The State may in like manner regulate the grades of railways generally — changing them when necessary, and, particularly, at the points where they cross highways or other railways — and provide for an apportionment of the expense of making the crossing;[2] sometimes throwing the whole expense upon the railroad.

[1] Wilder *v.* Chicago & W. M. Ry. Co., 70 Mich. 382; Schut *v.* Chicago & W. M. Ry. Co., 70 Mich. 433; Lafferty *v.* Chicago & W. M. Ry. Co., 71 Mich. 35.

[2] Fitchburg R. R. Co. *v.* Grand Junction R. R. Co., 1 Allen, 552; *s. c.* 4 Allen, 198; Pittsburg, etc., R. R. Co. *v.* S. W. Penn. R. R. Co., 77 Pa. St. 173; Chicago M. & St. P. Ry. Co. *v.* City of Milwaukee, 97 Wis. 418; Wabash Ry. Co. *v.* City of Defiance, 167 U. S. 88; New York & N. E. Ry. Co. *v.* Town of Bristol, 151 U. S. 556; affirming *s. c.* 62 Conn. 527; Woodruff *v.* Catlin, 54 Conn. 277; Westbrook's Appeal, 57 Conn. 95; N. Y. & N. E. Ry. Co.'s Appeal, 58 Conn. 532; Woodruff *v.* Railroad Co., 59 Conn. 63; State's Attorney *v.* Branford, 59 Conn. 402; N. Y. & N. E. Ry. Co. *v.* Waterbury, 60 Conn. 1; Middletown *v.* N. Y. & H. Ry. Co., 62 Conn. 492; Mooney *v.* Clark, 69 Conn. 241; Selectmen of Norwood *v.* New York & N. E. Ry. Co., 161 Mass. 259. In Woodruff *v.* Catlin, 54 Conn. 277, the Supreme Court of Connecticut stated in part: "The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways in such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue." And, in affirming the judgment of the Supreme Court of Connecticut, in the case of N. Y. & N. E. Ry. Co. *v.* Town of Bristol, the Supreme Court of the United States, after a very full statement of the arguments of the counsel for the railroad, declared emphatically in favor of the right

The State may also prescribe the rate of speed at which highways and other railways may be crossed,[1] and while running within the corporate limits of a city or town.[2] The State may institute other regulations, having the pro-

of the State, if it should see fit, to impose upon the railroad the entire expense of a change of grade in crossings; Chief Justice Fuller making use of the following language: "The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the police power of the State, that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States. Railroad Co. *v.* Alabama, 128 U. S. 96; Georgia R. & B. Co. *v.* Smith, 128 U. S. 174; Railway Co. *v.* Beckwith, 129 U. S. 26; Dent *v.* West Virginia, 129 U. S. 114; Railroad Co. *v.* Gibbes, 142 U. S. 386; Railroad Co. *v.* Emmons, 149 U. S. 364." But see People *v.* Detroit, G. H. & M. Ry. Co., 79 Mich. 471, in which it was held that it was unreasonable, after a railroad had for forty years maintained at its own expense a farm crossing, convenient for the use of every one in the neighborhood, to require the railroad to provide and maintain at its own expense a residence crossing in immediate proximity to a house which has been subsequently built, so that the railroad tract shall be between the residence and the highway. And, so,

[1] Mobile, etc., R. R. Co. *v.* State, 51 Miss. 137.

[2] Rockford, etc., R. R. Co. *v.* Hillmer, 72 Ill. 235; Chicago, Rock Island, etc., R. R. Co. *v.* Reidy, 66 Ill. 43; Mobile & Ohio R. R. Co. *v.* State, 51 Miss. 137; Horn *v.* Chicago, etc., R. R. Co., 38 Wis. 463; Haas *v.* Chicago & N. W. R. R. Co., 41 Wis. 44; Erb *v.* Morasch (Kans. App.), 54 P. 323; 60 Kans. 251.

tection of life in view, such as requiring all railroad companies to ring their bell or blow the whistle of the engine on approaching a crossing or highway;[1] or to place and keep flagmen at such places, and at such times of the day, when the traffic and the passage of numbers of people make such a regulation reasonable and necessary.[2]

It is also a lawful exercise of police power to require a railroad to construct a bridge in passing over a public highway, instead of crossing it at the same grade;[3] or to prohibit a railroad from constructing its tracks or running cars on any street so near the depot of another railroad,

also, it has been held in Texas, that a law which requires railroad companies to make farm crossings within the inclosures of private landowners, is unconstitutional, so far as it is applied to companies, who have acquired their right of way and had fenced in their tracks, prior to the enactment of the statute. San Antonio & A. P. Ry. Co. *v.* Bell (Tex. Civ. App.), 32 S. W. 374. These two Western cases are to be distinguished from the cases cited above, in that they involve the provision for private farm crossings for the more or less exclusive benefit of private landowners; while the Eastern cases, above cited, are more reasonable, in that they relate to the intersection with the railroad tracks of streets and highways.

In Nebraska, an ordinance requiring two railroads to change specific portions of a viaduct, was sustained. Chicago B. & Q. Ry. Co. *v.* State, 47 Neb. 549.

[1] Veazie *v.* Mayo, 45 Me. 560; *s. c.* 49 Me. 156; Commonwealth *v.* Eastern R. R. Co., 103 Mass. 254 (4 Am. Rep. 555); Bulkley *v.* N. Y. & N. H. R. R. Co., 27 Conn. 486; Stuyvesant *v.* Mayor, etc., of New York, 7 Cow. 588; Pittsburg, Cin. & St. L. R. R. Co. *v.* Brown, 67 Ind. 45 (33 Am. Rep. 73); Galena *v.* Chicago, U. R. R. Co. *v.* Dill, 22 Ill. 264; Ohio & M. R. R. Co. *v.* McClelland, 25 Ill. 140; Chicago, etc., R. R. Co. *v.* Triplett, 38 Ill. 482; Clark's Administrator *v.* Hannibal & St. Jo. R. R. Co., 36 Mo. 202; Tobias *v.* Mich. Cent. Ry. Co., 103 Mich. 330.

[2] Toledo, etc., R. R. Co. *v.* Jacksonville, 67 Ill. 37; Lake Shore & M. S. Ry. Co. *v.* Cincinnati, S. & C. Ry. Co., 30 Ohio St. 604.

[3] People *v.* Boston & Albany R. R. Co., 70 N. Y. 569. But it would be unconstitutional to require railroad companies to build crossings at the intersection of their road with a highway, which had been constructed after the railroad has been built. City of Erie *v.* Erie Canal Co., 59 Pa. St. 174; Ill. Cent. R. R. Co. *v.* Bloomington, 76 Ill. 447. See *ante*, pp. 997–999, same section, on the regulation of grade crossings in general.

as to interfere with a safe and convenient access to the latter road.[1]

It has also been held to be constitutional to require railroads, whose tracts intersect, to put in connecting switches, in order to transfer cars from one road to the other.[2] And where several railroads, some the lessees of the others, make a common use of the viaduct, upon entering a city, the expense of maintaining such viaduct may be laid entirely upon the lessor companies, without in any way infringing their constitutional rights; particularly, where the contractual relations and liabilities between the lessor and lessee railroads are not disclosed.[3]

The State may also make all kinds of reasonable regulations for insuring a fair and impartial carriage of all persons and property. The right to regulate the charges of corporations in general has already been fully explained,[4] and the railroad companies may be subjected to such regulations, as well as any other corporation. In consequence of the racial prejudice, there is a disposition in some parts of the country to make invidious distinctions in the accommodations provided for the white and black passengers. While it is in violation of the common law rights of the negro, as well as of the constitutional and statutory provisions, which guarantee to the negro equal privileges in

[1] Portland, S. & P. R. R. Co. *v.* Boston and Maine R. R. Co., 65 Me. 122; State ex rel. Abbott *v.* Hicks, Judge, 44 La. Ann. 770; The Sue, 22 Fed. 843; Logwood *v.* Memphis, etc., R. R. Co., 23 Fed. 318; McGuinn *v.* Forbes, 37 Fed. 639; Houck *v.* South Pac. Ry., 38 Fed. 226; Heard *v.* Ga. R. R. Co., 3 Int. Com. Com'r, 111; *s. c.* 1 *Ibid.* 428; Day *v.* Owen, 5 Mich. 520; Louisville, N. O. & T. Ry. Co., 66 Miss. 662; State *v.* Smith, 100 Tenn. 494; Chesapeake & Ohio Ry. Co. *v.* Commonwealth (Ky. '99), 51 S. W. 160; Chesapeake, etc., R. R. Co. *v.* Wells, 85 Tenn. 613; Memphis, etc., R. R. Co. *v.* Benson, 85 Tenn. 627; People *v.* King, 110 N. Y. 418.

[2] Jacobson *v.* Wisconsin, M. & St. P. Ry., 71 Minn. 519.

[3] Chicago, B. & Q. Ry. Co. *v.* State, 170 U. S. 57.

[4] See, *ante*, § 212. The State may require all railroad companies to post up in its stations schedules of the rates of fare and freight, without violating any constitutional provision. Railroad *v.* Fuller, 17 Wall. 560.

the use and enjoyment of the public conveyances, hotels, and places of amusement,[1] if the railroad company should deny to him the use of the first-class and sleeping cars; [2] yet it is lawful for them to provide separate cars for the two races, provided their appointments and conveniences are equally good.[3]

In Louisville, N. & O., etc., Ry. Co. *v.* Mississippi,[4] the court say: —

"It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance, the white race, is property, in the same sense that a right of action or of inheritance is property. Conceding this to be so for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach (*sic*) he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property since he is not lawfully entitled to the reputation of being a white man.

"In this connection it is also suggested by the learned counsel for the plaintiff in error that the same argument, that will justify the State legislature in requiring railways to provide separate accommodations for the two races, will also authorize them to require separate cars for people whose hair is of a certain color, or who are aliens or who belong to certain nationalities, or to enact laws requiring

[1] As to the constitutionality of these laws in general, see, *ante*, § 95.

[2] Hall *v.* De Cuir, 95 U. S. 485; Alexander & Washington R. R. Co. *v.* Brown, 17 Wall. 445; Chicago & N. W. Ry. Co. *v.* Williams, 55 Ill. 185; Coger *v.* N. W. Union Packet Co., 37 Iowa, 145.

[3] West Chester & P. R. R. Co. *v.* Miles, 55 Pa. St. 209; Central R. R. Co. *v.* Green, 86 Pa. St. 421; Chicago & N. W. Ry. Co. *v.* Williams, 55 Ill. 185.

[4] 133 U. S. 587.

colored people to walk upon one side of the street and white people upon the other, or requiring white men's houses to be painted white and colored men's black, etc.; upon the theory, that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in Yick Wo *v.* Hopkins, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race." * * *

"So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of

Congress, requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of State legislatures."

In Plessy *v.* Ferguson,[1] the court says, in part: —

"The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters and railway carriages, has been frequently drawn by this court. Thus in Strander *v.* West Virginia,[2] it was held that a law of West Virginia, limiting to white male persons twenty-one years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing it to a condition of servility. Indeed the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race and no discrimination against them because of color, has been asserted in a number of cases.[3] So where the law of a particular State or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we have held that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to white persons.[4]

"Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons traveling within that State, equal rights and privileges in all parts of the

[1] 163 U. S. 537.

[2] 100 U. S. 303.

[3] Virginia *v.* Rives, 100 U. S. 313; Neal *v.* Delaware, 103 U. S. 370; Bush *v.* Kentucky, 107 U. S. 110; Gibson *v.* Mississippi, 162 U. S. 565.

[4] Railway Company *v.* Brown, 17 Wall. 445.

vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be, so far as it applied to interstate commerce, unconstitutional and void." [1]

On the same principle, it has been held that the railroads are not required to admit whites and blacks to the same waiting room at the stations, provided the accommodations are not unequal.[2]

It is also held to be a lawful exercise of police power to require railroads to draw the cars of other corporations as well as their own, at reasonable times and for a reasonable compensation, to be agreed upon by the parties or fixed by the railroad commissioners.[3]

In order that the inhabitants of the country, through which a railroad passes, may be assured a reasonable use of the regular trains, the legislature may determine at what stations, and for what length of time, all trains shall be required to stop;[4] and all agreements of railroad companies, which limit the location of stations, are void because against public policy.[5]

It has, likewise, been held to be a reasonable exercise of police power to require railroads to keep posted at every station the times of arrival and departure of the trains,

[1] Hall *v.* De Cuir, 95 U. S. 485.

[2] Smith *v.* Chamberlain, 38 S. C. 529.

[3] Rae *v.* Grand Trunk Ry. Co., 14 Fed. Rep. 401.

[4] Railroad Commissioners *v.* Portland, etc., R. R. Co., 63 Me. 269 (18 Am. Rep. 208); State *v.* New Haven, etc., R. R. Co., 43 Conn. 351; Davidson *v.* State, 4 Tex. Ct. App. 545 (30 Am. Rep. 166); Chicago & Alton R. R. Co. *v.* People, 105 Ill. 657; Illinois Cent. Ry. Co. *v.* People, 143 Ill. 434; State *v.* Kansas City, Ft. S. & G. Ry. Co., 32 Fed. 722; Gladson *v.* State of Minnesota, 166 U. S. 427; *s. c.* 57 Minn. 387; Lake Shore & M. S. Ry. Co. *v.* Ohio, 173 U. S. 285.

[5] St. Joseph & Denver City R. R. Co. *v.* Ryan, 11 Kan. 602 (15 Am. Rep. 357); Marsh *v.* Fairburg, etc., R. R. Co., 64 Ill. 414 (16 Am. Rep. 564); St. Louis, etc., R. R. Co. *v.* Mathers, 71 Ill. 592 (22 Am. Rep. 122).

and to announce whether the trains are on time; and, when late, how much behind time.[1] Laws have also been sustained, which required railroads to light up their roads at night,[2] and which regulated the construction of switches, prohibiting certain kinds;[3] which regulated the heating of cars, forbidding the use of stoves;[4] which prohibited smoking in street cars;[5] which required street car companies, operating electric, steam or cable cars, to provide on the front platform an inclosure for the protection of the motorman from unnecessary exposure to the weather;[6] and which require railroads, on live-stock trains, to feed and water the stock while in course of transportation.[7] It has also been held to be competent for a State to prohibit the running of freight trains on Sundays.[8]

So, also, has it been held to be a constitutional exercise of police power, in compelling engineers of railroads to submit to examination for color blindness, to require the railroads to bear the expense of the examination.[9] And it has been declared to be reasonable and constitutional, in the regulation of the safe transportation and delivery of freight, to impose penalties for the improper refusal of the delivery of freight to the proper consignee;[10] and to require the railroad, if the consignee does not call for the goods within twenty days after notice of their arrival, to turn the same over for safe-keeping to a warehouseman or storage company.[11]

[1] Pennsylvania Ry. Co. *v.* State, 142 Ind. 428; State *v.* Pennsylvania Ry. Co., 133 Ind. 700; State *v.* Ind. & I. S. Ry. Co., 133 Ind. 69.

[2] Village of St. Bernard *v.* C. C. C. & St. L. Ry. Co., 4 Ohio L. D. 371.

[3] Jones *v.* Ala. & V. Ry. Co., 72 Miss. 220.

[4] New York, N. H. & H. Ry. Co. *v.* State of New York, 165 U. S. 628, 632.

[5] State *v.* Heidenhain, 42 La. Ann. 483.

[6] State *v.* Smith, 58 Minn. 35; State *v.* Hoskins, 58 Minn. 35.

[7] Gulf, C. & S. F. Ry. Co. *v.* Gray (Tex. Civ. App.), 24 S. W. 837.

[8] State *v.* Balt. & Ohio R. R. Co., 24 W. Va. 783 (49 Am. Rep. 290).

[9] Nash. C. & St. L. Ry. Co. *v.* Alabama, 128 U. S. 96.

[10] Ft. Worth & D. Ry. Co. *v.* Lillard (Tex.), 16 S. W. 654.

[11] State *v.* Chicago, M. & St. P. Ry. Co., 68 Minn. 381; State *v.* Great

With a view to prohibit the combination of railroads into extensive monopolistic systems of railroads, with the consequent abolition of competition, it is a rather common regulation to prohibit the consolidation of competing roads; and the regulation has been held to be a constitutional exercise of the police power.[1] The power to lease a railroad is equally subject to police regulation and limitation. The State may, for example, require all leases, in order to be valid, to be recorded.[2]

The regulation of the issue by railroads of tickets is not uncommon, and is sustained, whenever it is a reasonable one. Laws, which require the issue of mileage tickets, at certain rates, have been sustained;[3] in one case, requiring that the mileage ticket must be issued in the name of the purchaser, his wife and children, and must be receivable for two years from date.[4] State laws sometimes require that stop-over privileges shall be allowed to the holder of tickets.[5]

It would be impossible to mention in detail all the police regulations, to which railroad corporations are now subjected in the interests of the public. The test of their constitutionality is, in every case, whether they are designed, and do tend, to protect some public or private right from the

Northern Ry. Co., 68 Minn. 381; State *v.* Chicago Great Western Ry. Co., 68 Minn. 381; State *v.* Minneapolis, St. P., etc., Ry. Co., 68 Minn. 381.

[1] Pennsylvania Ry. Co. *v.* Com. (Pa.), 7 A. 368; Gulf, C. & S. F. Ry. Co. *v.* State, 72 Tex. 404; Louisville & N. Ry. Co. *v.* Commonwealth (Ky.), 31 S. W. 476. See, Alexandria Bay Steamship Co. *v.* N. Y. C. & H. Ry. Co., 45 N. Y. S. 1091, in which, in the interpretation of such a law, a distinction was made between the combination of competing parallel lines, and the arrangements for continuous transportation, which might be made between connecting lines.

[2] Commonwealth *v.* Chesapeake & O. Ry. Co. (Ky.), 40 S. W. 250.

[3] Dillon *v.* Erie Ry. Co., 43 N. Y. S. 320; Beardsley *v.* N. Y. L. E. & W. Ry. Co., 44 N. Y. S. 175.

[4] Smith *v.* Lake Shore & M. S. Ry. Co., 114 Mich. 460.

[5] Lafarier *v.* Grand Trunk Ry. of Canada, 84 Me. 286; Georgia R. L. & Bkg. Co. *v.* Clarke, 97 Ga. 706.

injurious act of the railroad company. And the most complete legislation of this kind is that which provides for the general supervision of the railroads by commissioners, appointed by the State, and given full power to make inspection of the working and management of the roads. The constitutionality of this State supervision cannot well be doubted. "Our whole system of legislative supervision through the railroad commissioners, acting as a State police over railroads, is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and, therefore, liable to be thus enforced." [1]

[1] Railroad Commissioners *v.* Portland, etc., R. R. Co., 63 Me. 269 (18 Am. Rep. 208).

CHAPTER XVI.

THE LOCATION OF POLICE POWER IN THE FEDERAL SYSTEM OF GOVERNMENT.

SECTION 215. The United States government one of enumerated powers.
216. Police power generally resides in the States.
217. Regulations affecting interstate commerce.
218. License tax upon drummers and peddlers.
219. Taxation of interstate commerce.
220. State regulation and prohibition of interstate commerce, particularly in articles of merchandise.
221. State regulation of railroads and other common carriers, and of their business, when an interference with interstate commerce.
222. The jurisdiction of anti-trust laws, national and State, as affected by the interstate commerce clause.
223. Control of navigable streams.
224. Regulation of harbors — Pilotage laws.
225. National and State quarantine laws.
226. Regulation of weights and measures.
227. Counterfeiting of coins and currencies.
228. Regulation of the sale of patented articles.
229. War and rebellion
230. Regulation of the militia.
231. Taxation.
232. Regulation of offenses against the laws of nations.
233. The exercise of police power by municipal corporations.

§ 215. The United States government one of enumerated powers. — Very frequently, during the first century of our national existence, the government of the United States has assumed powers, which were highly essential to the promotion of the general welfare, but which were not expressly delegated to the Federal government. The exercise of such powers has always met with the vehement objection of the party in opposition (although each of the great national parties has in turn exercised such questionable powers, when-

ever public necessities or party interest seemed to require it); the objection being that the constitution did not authorize the exercise of the power, since there was no delegation of it by the constitution. Popular opinion, concerning the fundamental character of the Federal government, was formulated in the adoption of the tenth amendment to the constitution, which provides that "the powers, not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." Relying upon this amendment as the authority for it, it has become the universally recognized rule of constitutional construction that, adopting the language of an eminent writer on constitutional law, "the government of the United States is one of enumerated powers, the national constitution being the instrument which specifies, and in which the authority should be found for the exercise of, any power which the national government assumes to possess. In this respect it differs from the constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess." [1]

The so-called "strict constructionists" have maintained that the United States can exercise no power but what is *expressly* granted by the constitution. But this rule was at times applied so rigidly by the party in opposition, whenever it was desirable to prevent the enactment of an obnoxious law, that the right was denied to the United States to exercise even those powers which, although not expressly delegated, were so necessary to the effectuation of the ex-

[1] Cooley Const. Lim. 10, 11. See, also, to the same effect, Marshall, Ch. J., in Gibbons *v.* Ogden, 9 Wheat. 1; Story, J., in Martin *v.* Hunter's Lessee, 1 Wheat. 304, 326; Waite, Ch. J., in United States *v.* Cruikshanks, 92 U. S. 542; Calder *v.* Bull, 3 Dall. 386; Trade-Mark Cases, 100 U. S. 82; Briscoe *v.* Bank of Kentucky, 11 Pet. 257; Gilman *v.* Philadelphia, 3 Wall. 713; and numerous judicial utterances of the same import in the State reports.

press powers, that it cannot be supposed that the framers of the constitution did not intend to grant them. In numerous instances, the question of constitutional construction has been brought for settlement before the Supreme Court of the United States; and it is now firmly settled, that the Federal government can exercise, not only the powers which are expressly granted, but also those powers, the grant of which can be fairly implied from the necessity of assuming them, in order to give effect to the express grant of powers. "The government of the United States can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication."[1]

This doctrine of implied powers gave to the Federal constitution that elasticity of application, without which the permanency of the Federal government would have been seriously endangered.[2] But at the same time it produced the very evil, in a greater or less degree, the fear of which urged the strict constructionists to oppose its adoption, viz.: that it would open the way to the most strained construction of express grants of power, in order to justify the exercise of powers that could not be fairly implied from the express grants. Indeed, the country has often been presented with the spectacle of United States judges and legislators, engaged in justifying questionable but necessary assumptions of power by the general government,

[1] Story, J., in Martin *v.* Hunter's Lessee, 1 Wheat. 304, 326; Ch. J. Marshall in Gibbon *v.* Ogden, 9 Wheat. 1, 187, and other cases cited *supra*.

[2] "While the principles of the constitution should be preserved with a most guarded caution, it is at once the dictate of wisdom and enlightened patriotism to avoid the narrowness of interpretation, which would dry up all its vital powers, or compel the government [as was done under the confederation], to break down all constitutional barriers, and trust for its vindication to the people, upon the dangerous political maxim, that the safety of the people is the supreme law (*salus populi suprema lex*); a maxim which might be used to justify the appointment of a dictator, or any other usurpation." Story on Constitution, § 1292.

by laboriously twisting, turning and straining the plain literal meaning of the constitutional provisions, seeking to bring the powers in question within the operation of some express grant of power. For illustration I will refer only to two extreme cases, the Louisiana purchase, and the issue of treasury notes with the character of legal tender.

In the case of the Louisiana purchase, the exercise of the questionable power was so plainly beneficial to the whole country, that it was generally acquiesced in. But the claim of an express or implied power to make the purchase was so palpably untenable, that the transaction has been tacitly admitted to have been an actual but necessary violation of the constitution. Even Mr. Jefferson, to whom the credit of effecting the purchase of Louisiana was justly and chiefly due, was of the opinion that there was no warrant in the constitution for the exercise of such a power, and recommended the adoption of an amendment to the constitution, authorizing its purchase. In speaking of the objections that were urged against the project, Judge Story says: "The friends of the measure were driven to the adoption of the doctrine that the right to acquire territory was incident to national sovereignty; that it was a resulting power, growing necessarily out of the aggregate power confided by the Federal constitution, that the appropriation might justly be vindicated upon this ground, and also upon the ground that it was for the defense and general welfare." [1]

The acquisition of Puerto Rico, Guam and the Philippine Islands, in pursuance of the treaty of peace with Spain in closing the war of 1898 with that country, has again raised the question of the undefined power of the United States to acquire foreign territory. But the present opponents of this policy of territorial expansion make a very different point against the acquisition of foreign territory. They

[1] Story on Constitution, § 1286.

concede the power to acquire foreign territory by purchase or conquest, but they deny that this government has any power to make out of such acquired territory colonial dependencies; *i. e.* permanent dependencies. They say that the purchase of the Louisiana territory was constitutional, because it was contiguous territory; and could be expected to be ultimately populated by people of our own or kindred nationalities; that the territorial governments which Congress had established in this and other territories, which had been heretofore purchased, were temporary governmental organizations, which were designed to prepare the new communities for ultimate admission into the sisterhood of States on terms of absolute political equality, in accordance with the provisions of the Federal constitution, when the territorial governments would be superseded by a semi-independent State government, formed by the people of the territory under a constitution of their own making. The so-called anti-imperialists claim that the present cases of acquisition of foreign territory are in violation of the fundamental principles of the American Declaration of Independence, in that it is proposed to deny in perpetuity to the inhabitants of those islands, the right of establishing an independent government of their own, as well as to ultimate participation and representation in our national government. Whatever truth there may be in the allegation, that the proposition to create colonial dependencies is in violation of the principles of the American Declaration of Independence, it is not a practical question of constitutional law, as, I think, the argument in the present section will demonstate.

An equally remarkable case of a strained construction of constitutional provisions is the exercise by Congress of the power to make the United States treasury notes legal tender in payment of all debts, public and private. The exercise of this power is not so plainly beneficial; on the contrary, it has been considered by many able publicists to be

both an injurious and a wrongful interference with the private rights of the individual.[1] For this reason, the assumption of the power by the national government has not met with a general acquiescence; and the constitutionality of the acts of Congress, which declared the treasury notes to be legal tender, has been questioned in numerous cases, most of which have found their way by appeal to the Supreme Court of the United States. In Hepburn *v.* Griswold,[2] the acts of Congress of 1862 and 1863 were declared to be unconstitutional, so far as they make the treasury notes of the United States legal tender in the payment of pre-existing debts. In the Legal Tender Cases,[3] the opinion of the court in Hepburn *v.* Griswold was overruled, and the acts of 1862 and 1863 were declared to be constitutional in making treasury notes legal tender, whether they applied to existing debts, or those which were created after the enactment of the statutes, the burden of the opinion being that Congress has the right, as a war measure, to give to these notes the character of legal tender. In 1878, Congress passed an act, providing for the reissue of the treasury notes, and declared them to be legal tender in payment of all debts. In a case, arising under the act of 1878, the Supreme Court has finally affirmed the opinion announced in 12 Wallace, and held further that, the power of the government to make the treasury notes legal tender, when the public exigencies required it, being admitted, it becomes a question of legislative discretion, when the public welfare demands the exercise of the power.[4] A perusal of these cases will disclose the fact that the members of the court, and the attorneys in the causes, have not referred to the same constitutional provisions for the authority to make the

[1] See *ante*, § 91, for a full discussion of the power of the United States Government to make its treasury notes legal tender in payment of debts.

[2] 8 Wall. 603.

[3] 12 Wall. 457.

[4] Juillard *v.* Greenman, 110 U. S. 421.

treasury notes legal tender. Some have claimed it to be a power, implied from the power to levy and carry on war; some refer it to the power to borrow money, while others claim it may be implied from the grant of power to coin money and regulate the value of it. It will not be necessary for the present purpose to demonstrate that this power is not a fair implication from the express powers mentioned. A careful reading of all the opinions in the cases referred to will at least throw the matter into hopeless doubt and uncertainty, if it does not convince the reader that in assuming this position, violence has been done by the court to the plain literal meaning of the words. There are only too many cases, in which forced construction has been resorted to, in order to justify the exercise of powers which are deemed necessary by public opinion. No change in the rules of construction will prevent altogether the tendency to strain and force the literal meaning of the written constitution, in order to bring it into conformity with that unwritten constitution, which is the real constitution, and which is slowly but steadily changing under the pressure of popular opinion and public necessities, checked only by the popular reverence for the written word of the constitution. But all justification for this violent construction can be removed by correcting a most surprising error in constitutional construction, an error which has produced an anomaly in constitutional law.

A stable and enduring government can not be so constructed, that no branch of it can exercise a given power, unless it is granted by the constitution, expressly or by necessary implication. A government, as a totality, may properly be compared to a general agent, who does not require any specific delegation of power, in order to do any act, provided it falls within the scope of the agent's general authority. A government, like a general agent, may have express restrictions or limitations imposed upon the general powers. But in the absence of a prohibition, the right to

exercise a given power, which falls within the legitimate scope of governmental authority, must be vested in some branch of the government.

Referring to the Federal system, it is claimed, in the assertion of this principle, that either the general government or the several State governments may exercise such a power, unless its exercise is prohibited to both by the Federal constitution. I do not mean to say that constitutional conventions never attempt to lay down a different rule. On the contrary, if the great men, who have contributed to the building up of American constitutional law, have been free from error in their construction of the tenth amendment to the Federal constitution, the adoption of that amendment was an attempt to do this impossible thing; and the attempt has resulted in repeated violations of the constitution as construed by them, by the assumption by Congress of powers, which were not expressly delegated nor fairly implied. The Louisiana purchase and the Legal Tender Cases, already referred to, furnish sufficient illustration of the truth of the statement. Cases of the same character will surely arise from time to time, and each repetition will diminish the popular reverence for the written constitution; an evil which every earnest jurist would like to prevent. The difficulty lies in the interpretation and construction of the tenth amendment.

According to the prevailing interpretation of that amendment, in order that the United States may by treaty make a purchase of foreign territory, or declare by act of Congress that the treasury notes shall be legal tender in payment of all public and private debts, the power must be granted by the constitution. It is clear that the State governments cannot exercise these powers, for the exercise of them is expressly prohibited to the States. But if it can be shown that this interpretation of the tenth amendment is erroneous, — unless the common law maxim, *communis error facit jus*, is recognized as binding in this case, —

it must be conceded that the United States may exercise these and other like powers, although they are not expressly or impliedly granted.[1] There is no reason why the real meaning of that amendment should not be given effect, in construing the constitutionality of such acts. For no rule of construction is binding upon the courts and other departments of the government, which does not rest for its authority upon some provision of the written constitution.[2]

The tenth amendment reads as follows: "The powers, *not delegated to the United States by the constitution, nor prohibited by it to the States*, are reserved to the States respectively, or to the people." It is clear that, if a given power is not prohibited to the States, the general government cannot exercise it, unless there is an express delegation of the power. The amendment declares that such powers are reserved to the States or to the people. But if a given power is prohibited to the States, but not delegated to the United States (the right to make purchase of foreign territory, for example), can it be said that under this amendment the exercise of this power is reserved to the States? The very prohibition to the States in the Federal constitution forbids such a construction. It may be claimed that in such a case the power would be reserved "to the people." But that claim cannot be sustained. The reservation of the powers

[1] It must not be understood from what is said that the writer recognizes in the national government the power to make its treasury notes legal tender. On the contrary, the power is denied to both State and Federal government on the ground that the Federal constitution expressly prohibits to both the exercise of the power. See *ante*, § 91.

[2] "As men whose intentions require no concealment generally employ the words which most directly and aptly express the idea they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. * * * We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. 1.

(referred to in this amendment), in the alternative, "to the States respectively or to the people," evidently involves a consideration of the possibility that the State constitutions may prohibit to the States the exercise of the power that is reserved, and in that case the power would be reserved to the people.

What powers "are reserved to the States respectively, or to the people?" The answer is, those powers which are "*not* (*neither*) delegated by the constitution to the United States, *nor* prohibited by it to the States." These two clauses, which contain the exceptions to the operation of the amendment, are not in the alternative. In order that it may be claimed under this amendment that a power is "reserved to the States respectively or to the people," it must avoid both exceptions, *i. e.*, it must be a power which is *neither* delegated to the United States, *nor* prohibited to the States. It cannot be successfully claimed that a power is reserved under this provision, which is prohibited by the Federal constitution to the States, for the reason that it is not delegated to the United States. The conclusion, therefore, is that the United States government is one of enumerated powers, so far that it cannot exercise any power which is not prohibited by the constitution to the States, unless it is expressly or impliedly delegated to the United States. But those powers, which are prohibited to the States, and which fall legitimately within the scope of governmental authority, may be exercised by the United States unless they are also prohibited to the United States. There need not be any express or implied grant of such powers to the national government.

It is not pretended or claimed that the construction of the tenth amendment here advocated conforms more nearly to the intentions of the framers of the constitution than that which has generally been accepted by writers upon the constitutional law of the country. Indeed, the early history of the United States reveals forces of disintegration in the

politics of that day, equal or almost equal to the forces of consolidation, which would incline one to suppose that the intentions of the law-makers in the formation of the constitution were embodied in that construction of constitutional provisions which would most effectually hamper and curtail the powers of the national government. The great struggle of the wise men of those days was to secure for the Federal government the delegation of sufficient power to establish an independent government, and it may be said with truth that the Federal constitution was wrested from an unwilling people. It would, therefore, be impossible to show that the construction of the tenth amendment here advocated was in conformity with the intentions and expectations of those whose votes enacted the amendment. It is freely admitted that the prevailing construction is without doubt what the framers of the amendment intended. But the intentions of our ancestors can not be permitted to control the present activity of the government, where they have not been embodied in the written word of the constitution. Where the written word is equally susceptible of two constructions, one of which reflects more accurately the intention of the writer, the preference is given to that construction. But when this construction is discovered by the practical experience of a century to be pernicious to the stability of the government and in violation of the soundest principles of constitutional law; when the alternative construction is grammatically the only possible one, and relieves the constitutional law of the country of a serious embarrassment, it is but reasonable that the latter construction should be adopted, and its adoption would not violate any known rule of constitutional construction.

§ 216. **Police power generally resides in the States.** — But this discussion concerning the true construction of the tenth amendment of the United States constitution only affects the location of those phases of police power, which

are denied by the constitution to the States, and which are neither granted nor prohibited to the United States, as in the case of making anything else besides gold and silver legal tender in the payment of private and public debts, or in the purchase of foreign territory, and the like; and the question in such cases is not, whether the power to do these things resides in the Federal or State government, but whether the power can be exercised at all. In all ordinary cases of police powers, the meaning and legal effect of the tenth amendment is clear, viz.: that unless the exercise of a particular police power is granted to the United States government, expressly or by necessary implication, the power resides in the State government, and may be exercised by it, unless the State constitution prohibits its exercise. It may, therefore, be stated as a general proposition that with the few exceptions, which are mentioned in the succeeding sections, the police power in the United States is located in the States. The State is intrusted with the duty of enacting and maintaining all those internal regulations which are necessary for the preservation and the prevention of injury to the rights of others. The United States government cannot exercise this power, except in those cases in which the power of regulation is granted to the general government, expressly or by necessary implication. For example, it was held unconstitutional for Congress to declare it to be a misdemeanor for any one to mix naptha and illuminating oils, and offer the adulterated article for sale, or to prohibit the sale of petroleum that is inflammable at a less than the given temperature. This was a police regulation that could only be established by the States.[1]

So, also, it has been held to be unconstitutional for Congress to undertake to regulate the equal rights of citizens to make use of the public conveyances, hotels and places of amusement. In order to give full effect to the fourteenth

[1] United States *v.* De Witt, 9 Wall. 41; Patterson *v.* Commonwealth, 11 Bush, 311; *s. c.* 97 U. S. 501.

amendment, which prohibited the States from passing or enforcing any law, which denied to any person within its jurisdiction the equal protection of the laws, Congress passed an act which declared that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theaters and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to the citizens of every race and color, regardless of any previous condition of servitude.[1] The ordinary police regulation of employments and professions is most certainly within the powers of the State governments. Independently of the fourteenth amendment to the national constitution, it would not be within the power of Congress to enact a law, which provided for the compulsory formation of business relations, for such regulations fall within the ordinary police power of the State. The fourteenth amendment merely prohibits a State from passing or enforcing any law, which denied to any person equality before the law. If a State should not deem it proper to provide that the hotels of the State shall be open for the reception and entertainment of all persons who may apply, Congress cannot supply the deficiency by an enactment of its own; for in such a case there has been no violation of the fourteenth amendment. The amendment is violated only when the States attempt by legislation to establish an inequality in respect to the enjoyment of any rights or privileges. It has, therefore, been held by the United States Supreme Court that the civil rights bill, the act of 1875 just mentioned, is unconstitutional because it invades the police jurisdiction of the States.[2]

[1] Laws of 1875, ch. 114.

[2] Civil Right's Cases, 109 U. S. 3. See Ex parte Yarborough, 110 U. S. 651.

In the Civil Rights Case,[1] the court says: The Fourteenth Amendment, "does not invest Congress with power to legislate upon subjects that are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by the power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect."

It must be remembered that, in this discussion, reference is made only to the division of the police powers of the government between the general and State governments, as they are to be exercised within the boundaries of the States, which compose the Union. There is no such division of the police power in the territories, which have not been admitted to the statehood, in the District of Columbia, or in the foreign possessions of the United States. Over these, the power of Congress is supreme, limited only by the provisions of the United States constitution. It has been recently held that the police power of Congress over the District of Columbia is similar to the police power of the States over their respective territory, with only those modifications which the provisions of the Federal constitution have imposed.[2]

[1] 109 U. S. 3.

[2] Lansburgh *v.* District of Columbia, 11 App. D. C. 512.

§ 217. **Regulations affecting interstate commerce.** — In article I., section 8, clause 3, of the United States constitution, it is provided that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." In conformity with this constitutional provision, it has been held that, whenever Congress exercises this form of regulation over foreign and interstate commerce, State regulations must invariably give way; and that the regulations by Congress of commerce may descend to the minutest details, providing regulations of the most local character in the exercise of this power. Wherever the regulation of commerce is general and national in character, so that its enforcement in one locality to the exclusion of others would seriously disturb the uniformity of regulation which the national constitution contemplated, the power of Congress is exclusive of all State control, whether the congressional power be exercised or not. But where the proposed regulation of commerce is purposed to protect a local community from the dangers to health and life, or to private rights, which the unregulated prosecution of commerce might threaten, in the absence of congressional regulations, the State may to that end institute the ordinary reasonable police regulations of commerce.[1] But when Congress acts, all State regulations must give way in every case in which they conflict with the regulations of Congress.

In this case, as well as in the cases just explained, in which the power of Congress is exclusive, whether Congress has acted or not, the courts of the United States are empowered to employ all the enginery of legal procedure, as well as the national executive, the military forces at his

[1] Cooley *v.* Board of Wardens, 12 How. 299; State Freight Tax, 15 Wall. 232; Wabash, etc., Railway Co. *v.* Illinois, 118 U. S. 557; Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465; Leisy *v.* Hardin, 135 U. S. 100; Rhea *v.* Newport N. & M. V. Ry. Co., 50 Fed. 16; Cardwell Bridge Co., 113 U. S. 205.

command to remove obstructions to the orderly and peaceable prosecution of interstate commerce and the transmission of the mails, whether these obstructions are caused by State legislation, or by the unauthorized and unlawful acts of individuals.[1] Thus, in the absence of a general regulation of the kind by Congress, it is lawful for a State to provide for the inspection of tobacco, which is intended to be shipped to some point outside of the State, it being an ordinary police regulation, not designed to interfere with commerce but to facilitate the detection of fraud in the sale of this article.[2]

But the provision by State laws for the inspection of articles of interstate commerce opens the door, under the guise of ordinary sanitary regulations, to the covert prohibition or restriction of commerce between the States. While it is an undoubted power of the States, in the absence of Congressional regulation to provide for the safety and health of its inhabitants by the inspection of articles of interstate commerce, and the consequent elimination of all sources of danger to either; the regulations, which are based upon this inspection, must not go to the length of excluding articles of interstate commerce from the State, or operate to their disadvantage, in their competition with the home products of the same kind. The inspection by State officials of illuminating oils and of the tank-cars, in which they are transported, for the purpose of safe-guarding the public against explosions, is a reasonable police regulation, and the owners of the oil, and of the cars, may be charged an inspection fee, to cover the cost to the State of the inspection. And as long as the fee is a reasonable one, serving only to cover the expenses of maintaining the police regulation, it cannot be considered as contravening the constitution of

[1] In re Debs, 158 U. S. 564; Illinois Cent. Ry. Co. *v.* State of Illinois, 163 U. S. 142.

[2] Turner *v.* Maryland, 107 U. S. 38.

the United States by the imposition of a burden upon interstate commerce. It would, of course, be different, if the amount of the fee was so disproportionate to the expenses of the inspection, as that its exaction was properly construed to be a tax upon interstate commerce.[1]

A Louisiana regulation for the inspection of all boat-loads of coal or coke, which are brought into the State for sale therein, and for the payment of an inspection fee by the seller, has been sustained as a reasonable State regulation.[2] The same conclusion was reached concerning a Louisiana requirement of the inspection of flour.[3] But when an act of Virginia required the inspection of all flour, which was brought into the State for sale therein, but did not require a similar inspection of flour, which was manufactured within the State, the regulation was declared to be an unconstitutional discrimination against interstate commerce, by the direct imposition of a burden thereon.[4]

Whenever the amount of the charge for inspection is so large that it amounts to a prohibitory tariff on interstate commerce, it offends the constitution of the United States. Thus, a Virginia statute provided that before fresh meat, which is offered for sale at places distant one hundred miles or more from the place of slaughter, may be lawfully sold, it must be inspected, and the seller must pay, as an inspection fee, one cent per pound for the meat inspected. The Supreme Court of the United States held this to be a burden upon interstate commerce, in violation of the Federal constitution, in that the fee levied was a tax, and was intended, not to cover only the expenses of inspection, but to restrict trade in fresh meat which had been

[1] Willis *v.* Standard Oil Co., 50 Minn. 290.
[2] State *v.* Pittsburg & S. Coal Co., 41 La. Ann. 465.
[3] Glover *v.* Board of Flour Inspectors, 48 Fed. 348.
[4] Voight *v.* Wright, 141 U. S. 62.

slaughtered at a distance from the place of sale. The court intimated that, if it was demonstrated that meat, slaughtered at a great distance, became unwholesome for consumption as food, the prohibition might be lawful. But, in these days of refrigerated cars, this contention could not be successfully established.[1] Other States had enacted laws, prohibiting the sale of the fresh meat of animals which had not been inspected before slaughter within the State; but these laws had been declared to be an unconstitutional prohibition of interstate commerce in fresh meat.[2] But the reasonable regulations for the inspection of animals on the hoof, as well as of the fresh meat, after they have been slaughtered, which operate impartially against all classes, do not contravene the national constitution.[3]

The State may impose upon telephone companies, which are engaged in interstate business, reasonable regulations, which are designed to promote the safety of the local public, without violating the interstate commerce clause of the constitution.[4] So, also, may a State law provide that a railroad in its interstate business shall be liable for the loss of goods, or the injury to passengers, which had been occasioned by the negligence of the company's employees; provided that the State law did not go farther and declare void any agreement for exemption from such liability, which the railroad may have included in the bills of lading, which are used in the interstate business.[5]

[1] Brimmer *v.* Rebman, 138 U. S. 78. See, also, to the same effect, Farris *v.* Henderson (Okl.), 33 P. 380; City of Buffalo *v.* Reavey, 55 N. Y. S. 792; 37 App. Div. 228.

[2] Minnesota *v.* Barber, 136 U. S. 313; State *v.* Klein, 126 Ind. 68; Hoffman *v.* Harvey, 128 Ind. 600; Swift *v.* Sutphin, 39 Fed. 630.

[3] State *v.* People's Slaughterhouse & Refrigerator Co., 46 La. Ann. 1031.

[4] Michigan Telephone Co. *v.* City of Charlotte, 93 Fed. 11.

[5] Missouri K. & T. Ry. Co. *v.* McCann, 174 U. S. 580.

§ 218. **License tax upon drummers and peddlers.**—A very common police regulation, and one that is the source of much litigation, is the imposition by municipal government, and sometimes by State governments, of a license tax upon itinerant vendors, peddlers and traveling salesmen or drummers. As has been very fully explained in a preceding section of this book[1] a license tax is a police regulation or a tax in the proper sense of the term, according to the motive or purpose of its imposition. If the right to pursue a particular trade or business is made to depend upon the procurement of a license, which is granted only to those who give proof of their qualification to ply the calling without injury or damage to the public, — the exaction of the license being only a police provision for the regulation of the business in the interests of the public or of the persons having dealings with the licensees; and the tax levied upon them is measured by and limited to the expense of maintaining the police regulation — the license tax is strictly a police regulation; and, except from its conflict with interstate commerce, is rarely subjected to constitutional criticism, unless the exaction of a license, as a condition precedent to the prosecution of the business, is itself open to constitutional objection. But where the purpose of imposing a license tax is not merely to cover the expense of maintaining a justifiable police supervision of the business, but to add to the revenue of the city or State, the license tax is not a police regulation, but a tax; and it is valid or invalid, according as the constitutional requirements of uniformity and equality have been observed in its imposition. It may be fair to say that, in the levy of a license tax upon peddlers, the tax assumes the dual character of a police regulation, in that it tends to safeguard the confiding public from the frauds and misrepresentations of dishonest peddlers, and of a tax, in that the

[1] See *ante*, § 119.

amount exacted from such peddlers is in excess of the expense of maintaining the police supervision. But, generally, the license tax is imposed for the exclusive purpose of increasing the public revenue; and it is, therefore, more properly treated as a tax. And this is unquestionably true of the license tax, which States and municipalities have attempted to impose upon the traveling salesmen or drummers of non-resident merchants. If the license tax, in any particular case, be properly described as a police regulation, to protect the public against fraud and other dangers, and the tax is only sufficient to cover the expense of the necessary and justifiable police supervision of the business, I take it to be reasonably well established that the tax is constitutional, and not a burden upon interstate commerce, whether the business which the licensee pursues is properly described as interstate or domestic commerce. The question in such a case, is whether the police supervision thus established is or is not a reasonable exercise by the State of its police power.[1] But in order that such a police regulation may be constitutional, it must be enforced indiscriminately against all who pursue the same calling. It cannot be enforced against non-residents or the residents of other States, if the law does not apply to residents of the State. Such a discrimination would violate the guaranty of the United States constitution of equal privileges and immunities to the citizens of the different States.[2] It has been held in Pennsylvania that there is no violation of the interstate commerce clause of the constitution, if a State law prohibits peddling without license in a certain

[1] See Ward *v.* State, 31 Md. 279; *s. c.* 12 Wall. 418; Brown *v.* Maryland, 12 Wheat. 419; Speer *v.* Commonwealth, 23 Gratt. 935 (14 Am. Rep. 164); State *v.* North, 27 Mo. 464; Ex parte Robinson, 12 Nev. 263 (28 Am. Rep. 794).

[2] Walling *v.* Michigan, 116 U. S. 446; In re Watson, 15 Fed. 511; State *v.* McGinniss, 37 Ark. 362; Van Buren *v.* Downing, 41 Wis. 122; Marshalltown *v.* Blum, 58 Iowa, 184 (43 Am. Rep. 116).

county, even though the peddler brings his goods from another State.[1]

But where the license tax is, and can be properly construed only as a tax; it is necessarily invalid, in violation of the Federal constitution, if it is laid upon interstate commerce. When, therefore, a State or city imposes a license tax, as a tax, upon peddlers and traveling salesmen, the validity of the tax depends upon the nature of the business of the person so taxed. If he is engaged in interstate commerce, the tax is void; and if he engaged in domestic commerce, the tax is valid. In what constitutes the difference between peddlers and traveling salesmen or drummers? The Standard Dictionary defines the peddler to be "one who travels from house to house with an assortment of goods for retail;" and drummer "a traveling salesman who solicits custom." The peddler carries his stock of goods with him, and from that stock he sells to those who will buy; while the traveling salesman carries no stock, only a sample case, if anything; and solicits orders for goods, which his principal will supply from a stock which is kept elsewhere. In the case of the peddler, the contract of sale is made on the spot, and the goods delivered by him immediately, so that the entire transaction is begun and completed within the same State. His tradings cannot be anything but domestic commerce, whether he is the principal or he is only acting as the agent of a non-resident principal. But when the traveling salesman receives an order for goods, the executory contract of sale is made by him on the spot, to be performed, however, subsequently by the transportation of the goods to, and their delivery at, the place of sale. And if the principal and the goods are outside of the State, in which the sale was made, the transaction is interstate commerce. The levy of a license tax upon such a transaction would necessarily be a tax upon

[1] Commonwealth *v.* Dunham, 191 Pa. St. 73.

interstate commerce, which is prohibited, not only by the interstate commerce clause of the United States constitution, but also by Art. I., § 10, of the same constitution, which prohibits the imposition of a State tax upon imports and exports.

In conformity with this distinction between the peddlers and traveling salesmen, we find an uniform declaration of the courts that a license tax may constitutionally be imposed upon peddlers, for they are not engaged in interstate commerce.[1] But the imposition of a license tax upon a traveling salesman, who solicits and receives orders for goods for future delivery, is void, because he is engaged in interstate commerce, in every case in which the performance of the contract of sale involves the transportation of goods from one State to another, or the transfer of title to goods which are located in some other State than that in which the sale was made.[2] Even in the sale of intoxicating liquors, notwithstanding the wide scope and effect of the Wilson Bill, it is not within

[1] Emert *v.* State of Missouri, 156 U. S. 296; *s. c.* 103 Mo. 241; Commonwealth *v.* Harmel, 166 Pa. St. 89; Commonwealth *v.* Dunham, 191 Pa. St. 73; Rash *v.* Farley, 91 Ky. 344; State *v.* Gauss, 85 Iowa, 21; State *v.* Agee, 83 Ala. 110; Hall *v.* State, 39 Fla. 637; State *v.* Gorham, 115 N. C. 121. In Commonwealth *v.* Harmel, 166 Pa. St. 89, the regulation, which was sustained, was strictly a police regulation, in that it required the peddlers to furnish proof before the Court of Quarter Sessions of their good moral character, before they can obtain the required license.

[2] Ex parte Stockton, 33 Fed. 95; In re White, 43 Fed. 913; In re Flinn, 57 Fed. 496; Webster *v.* Bell, 68 Fed. 183; 15 C. C. App. 360; Robbins *v.* Taxing District, 120 U. S. 489; Carson *v.* Maryland, 120 U. S. 502; Leloup *v.* Port of Mobile, 127 U. S. 640; Asher *v.* State of Texas, 128 U. S. 129; McCall *v.* California, 136 U. S. 104; Ficklen *v.* Taxing District, 145 U. S. 1; Brennan *v.* City of Titusville, 153 U. S. 289; McLaughlin *v.* City of South Bend, 126 Ind. 471; City of Bloomington *v.* Bourland, 137 Ill. 534; Fecheimer *v.* City of Louisville, 84 Ky. 306; McGraw *v.* Town of Marion (Ky.), 34 S. W. 18; State *v.* Bracco, 103 N. C. 349; State *v.* Agee, 83 Ala. 110; Ex parte Murray, 93 Ala. 78; Talbutt *v.* State (Tex. Cr. App.), 44 S. W. 1091; Hurford *v.* State, 91 Tenn. 669; Pegues *v.* Ray (La.), 23 So. 904; Overton *v.* City of Vicksburg, 70 Miss. 558; Richardson *v.* State (Miss.), 11 So. 934; City of Fort Scott *v.* Pelton, 39 Kans. 764.

the police power of the State to exact a license fee or tax of a liquor drummer, who solicits orders for liquors, to be shipped into the State from some point outside.[1] A tax that was laid upon all solicitors of pictures, to be enlarged outside of the State, was held to be a tax upon interstate commerce, and for that reason void.[2] So, likewise, in regard to the exaction of a license fee from all persons within the State, who dealt in goods which were made by convicts in other States.[3] But it was held in Missouri that where a traveling salesman sold goods partly by sample, but also sold from a stock of goods, which he carried along with him, the imposition of a license tax upon him was not void because it was a burden upon interstate commerce.[4] So, likewise, it has been held that, where one agent of a foreign principal takes an order for goods to be shipped from another State, and another agent receives the goods so ordered and delivers them to the purchaser, this is a domestic sale, and not interstate commerce; and the local or State regulations control it.[5]

In South Dakota, a license tax was exacted of agents of commercial agencies; and the law was upheld, although it was enforced against a special agent of a foreign agency, who had been sent into the State for the purpose of making a special investigation into the financial standing of a local firm of merchants.[6] But it would seem, from the analogies to be drawn from the well-settled distinctions between peddlers and traveling salesmen, that this cannot be taken as a reliable precedent, so far as it sustains a license tax, which is imposed upon a non-resident and visiting agent of

[1] State *v.* Lichtenstein, 44 W. Va. 99.

[2] State *v* Scott, 98 Tenn. 254.

[3] In re Yanders, 1 Ohio N. P. 190; 2 Ohio Dec. 126; See Arnold *v.* Yanders, 56 Ohio St. 417.

[4] State *v.* Snoddy, 128 Mo. 523.

[5] Stevens *v.* Ohio, 93 Fed. 793; Chrystal *v.* City of Macon (Ga. '99), 33 S. E. 810.

[6] State *v.* Morgan, 2 S. D. 32; 48 N. W. 314.

the commercial agency. This agent's legal position would seem to be analogous to, if not identical with, that of the traveling salesman; whereas, the resident representatives of the agency would, like the peddlers, fall within the taxing power of the State and municipality.

The cases, which have just been fully elucidated, in which a license tax or fee is exacted of importers or exporters, and of persons who are in any way engaged in interstate commerce or trade, are not the only cases of imposition of a license tax upon interstate commerce. The same rule obtains, in regard to railroads, the telegraph companies, express companies, and other mediums of transportation and communication, which have both an interstate and an intra-state business. If the license tax is exacted for the transaction of domestic or intra-state business, it is valid, although the same company may likewise be engaged in an interstate business.[1] But if it is imposed upon those which are engaged only in interstate business, the license tax is void, because it is an unconstitutional burden upon interstate commerce. But where the license fee is exacted in such a case only in an amount sufficient to cover the expenses of maintaining an inspection, which is allowable under the constitutional limitations, this is not held to be a tax upon interstate commerce, but a part of the process of exercising the lawful police power of the State.[2]

[1] Crutchen *v.* Com., 141 U. S. 47; Postal Tel. Cable Co. *v.* City Council of Charleston, 153 U. S. 692; *s. c.* 56 Fed. 419; United States Express Co. *v.* Allen, 39 Fed. 712; United States Express Co. *v.* Hemmingway, 39 Fed. 60; City of St. Louis *v.* W. U. Tel. Co., 39 Fed. 59; Webster *v.* Bell, 15 C. C. A. 360; 68 F. 183; Osborne *v.* State of Florida, 164 U. S. 650; *s. c.* 33 Fla. 162; Western Un. Tel. Co. *v.* City of Fremont, 39 Neb. 692; Moore *v.* City of Eufaula, 97 Ala. 670; Alabama G. S. Ry. Co. *v.* City of Bessemer, 113 Ala. 668. But a city, as distinguished from the State, cannot impose a license tax upon the business of one of these companies, which is not conducted within the city. City of San Bernardino *v.* Southern Pac. Ry., 107 Cal. 524.

[2] Patapsco Guano Co. *v.* Board of Agriculture of North Carolina, 171 U. S. 345. See *ante*, § 119.

The reports contain a few cases of the attempt of State governments, by the exaction of license fees, to restrict certain exports to other States. In Pennsylvania, the requirement of a license fee is applied to the cases of purchase of certain enumerated articles in two counties of the State, for sale outside of those counties. The statute was sustained as a constitutional exercise of police power, and not a burden upon interstate commerce, on the ground that it was a tax upon the articles before they assumed the character of articles of interstate commerce. And it was, furthermore, declared by the court that the interstate commerce clause of the Federal constitution could not in any event invalidate the law, in its application to the unauthorized sale of such articles within the State.[1] Doubtless, this latter proposition is sound; but this would seem as objectionable a burden upon interstate commerce, as would the license tax of drummers. Furthermore, as a tax upon exports, it would offend the constitutional prohibition of the levy by States of all taxes upon exports.[2] A law, which imposed a license tax upon all packers and canners of oysters "for sale or transportation," was sustained by the Supreme Court of Maryland.[3]

On the other hand, the Supreme Court of North Carolina declared a State statute to be unconstitutional, which exacted of emigrant agents, who were hiring laborers for work outside of the State, a license fee that was so large as to amount to a restriction of the business. No facts were proven in support of any possible contention, that the business justified and required, in the interest of the public or of the laborers, the police supervision of the State.[4]

§ 219. **Taxation of interstate commerce.** — The cases of taxation or of attempted taxation by the State or municipal

[1] Rothermel *v.* Meyerle, 136 Pa. St. 250.
[2] U. S. Const. I., § 10.
[3] State *v.* Applegarth, 81 Md. 293.
[4] State *v.* Moore, 113 N. C. 697.

governments of interstate commerce, are not confined to the exactions of license fees from those who are engaged in interstate commerce, as presented in the preceding section. It is not an uncommon occurrence that the attempt is made to lay a more or less direct tax upon those who are engaged in interstate commerce, or upon the articles of interstate commerce, which they handle. Where the tax is properly construed, as a tax upon interstate commerce, it is unconstitutional, and cannot be enforced.

Under the guise of a police regulation, no tax may be laid by the State government upon either exports or imports. The tax will be void, because it is in contravention with § 10, Art I., of the United States Constitution, which declares that "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." This clause, as well as the interstate commerce clause, is violated, whenever a tax is laid upon exports or imports,[1] or upon the business of any importer or exporter, or upon the business of any one who is in any way engaged in the promotion of interstate commerce.

In presenting the limitations of the power of the States to tax corporations which are engaged in interstate commerce, two facts must not be allowed to pass out of sight. The first is, that the State cannot in any case prevent or restrict any corporation or natural person from engaging in an interstate contract or business. But the fact, that a foreign corporation is engaged in a business of interstate

[1] It has been held in Louisiana that this clause of the constitution does not refer to imports from another State, but only to imports from foreign countries. State v. Pittsburg & S. Coal & Coke Co., 41 La. Ann. 465. But see Am. Fertilizing Co. v. Board of Agriculture, 43 Fed. 609.

character and proportions, does not involve the right of such a corporation to go into another State, open a branch office, for the purpose of there prosecuting its business. In the preceding chapter,[1] it has been explained that foreign corporations, unlike the natural citizens of the different States, are not guaranteed the enjoyment of equal privileges and immunities, and may be refused altogether the right to engage in business in any State, other than that in which they have been created; but if they are admitted within any State, they cannot object to the arbitrary or discriminating character of the conditions of their admission into the State.[2] So that the exaction of a franchise or license tax from a foreign corporation like an industrial corporation, having a place of business within the State, can in no sense be considered a tax upon interstate commerce.[3] That is a very different tax, when it is laid upon a foreign coporation having a place of business within the State, than when it is exacted of a foreign corporation, which does business within, but which conducts it, from a place of business outside of the State, through traveling salesmen and agents, or by mail or telegraph.[4] In the former case, the transactions are domestic or intra-state; while, in the latter case, they are interstate contracts, forming a part of the interstate commerce, and being beyond the taxing power of the State. A law, which declares void a contract for the sale of goods, made by the traveling salesman of a foreign and non-resident corporation, unless a franchise fee is paid by such corporation into the State Treasury, is unconstitutional in that it imposes a restraint

[1] § 213.

[2] See cases, cited in § 213, and Pembina Con. Silver M. & M. Co. *v.* Pennsylvania, 125 U. S. 181; Hooper *v.* California, 155 U. S. 648; Moline Plow Co. *v.* Wilkinson, 105 Mich. 57; State *v.* Phipps, 50 Kans. 609.

[3] Moline Plow Co. *v.* Wilkinson, 105 Mich. 57.

[4] Coit & Co. *v.* Sutton, 102 Mich. 324. See, *contra,* Western Paper Bag Co. *v.* Johnson (Tex. Civ. App.), 38 S. W. 364.

upon interstate commerce.[1] The same rule obtains in regard to the direct taxation of the business, which a foreign corporation may do within the State from the place of business which it has established therein. This is not a tax upon interstate commerce, for the business taxed is done entirely within the State.[2]

Corporations, which are engaged in business, which is partly interstate and partly intra-state, like the railroads, telegraph and express companies, whose business extends over many States, do not, on account of the extensiveness of their business, escape taxation by the State. In a paragraph of the preceding section, it has been shown how far they may be subjected to a license tax. So, also, may they be subjected to a property and a franchise tax, provided neither as laid constitutes a burden upon interstate commerce. The fact, that property is employed in the prosecution of an interstate business, does not take that property out of the taxing power of the State.[3] Thus, a State may tax coal, like any other property within the State, which has been brought into the State, while it is still in the barges afloat upon the navigable waters of the State;[4] and forbid the sale of the same until it has been gauged by State officers.[5] A city or State may lay a property tax upon a telegraph company, which is measured by the number of poles or the feet of wire it may have and use within such city or State.[6]

[1] Coit & Co. *v.* Sutton, 102 Mich. 324; Aultman, Miller & Co. *v.* Holder, 68 Fed. 467; Kindel *v.* Beck and Paul Lithographing Co., 19 Colo. 310; Macnaughton Co. *v.* McGirl (Mont.), 49 P. 651.

[2] Singer Manufacturing Co. *v.* Wright, 97 Ga. 115; Singer Manufacturing Co. *v.* Wright, 33 Fed. 121.

[3] Cleveland C. C. & St. L. Ry. Co. *v.* Backus, 133 Ind. 513; Indianapolis & V. Ry. Co. *v.* Backus, 133 Ind. 609.

[4] Brown *v.* Houston, 114 U. S. 622; Pittsburg & S. Coal Co. *v.* Bates, 156 U. S. 577.

[5] Pittsburg & S. Coal Co. *v.* State of Louisiana, 156 U. S. 590.

[6] City of St. Louis *v.* Western Union Tel. Co., 148 U. S. 92; City of Philadelphia *v.* Am. Union Tel. Co., 167 Pa. St. 406; City of Philadelphia

So, also, would a property tax be valid, when it is laid upon the assessed valuation of the property of the telegraph company, which is located within the State, the assessment being determined by the entire value of the company's property, wherever located, in the proportion that its mileage of wires within the State bears to the entire mileage of its line.[1] The same rule of proportional assessment according to mileage within and without the State, when applied to the State taxation of express companies, has been sustained, as a valid exercise of the taxing power of the States, by the Supreme Court of the United States.[2] The same rule, that property, which is employed in the prosecution of interstate commerce, may nevertheless be taxed by the State, in which it is located, has been applied to an interstate pipe line company;[3] and to a bridge company, whose bridge spans a river which separates two States.[4]

So, also, may a corporation be subjected by a State to a franchise or business tax, provided such tax is laid exclusively upon the intra-state business, and the interstate business is altogether excluded from the burden of the tax. This rule has been applied to railroads[5] and to telegraph companies.[6] But where the tax is laid upon the

v. Postal Tel. Cable Co., 67 Hun, 21; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688; *s. c.* 71 Miss. 555.

[1] Western Un. Tel. Co. *v.* Taggart, 141 Ind. 281.

[2] Cleveland, C. C. & St. L. Ry. Co. *v.* Backus, 154 U. S. 439; affirming *s. c.* 133 Ind. 513; Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194; Adams Express Co. *v.* Kentucky, 166 U. S. 171.

[3] Tide Water Pipe Co. *v.* State Board of Assessors, 57 N. J. L. 516, following Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217.

[4] Henderson Bridge Company *v.* Commonwealth (Ky.), 31 S. W. 486; *s. c.* Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150.

[5] New York L. E. & W. Ry. Co. *v.* Pennsylvania, 158 U. S. 431; *s. c.* Commonwealth *v.* N. Y. Lake E. & W. Ry. Co., 145 Pa. St. 38; People *v.* Campbell, 74 Hun, 210; *s. c.* 144 N. Y. 478.

[6] Ratterman *v.* Western Union Tel. Co., 127 U. S. 411; Western Union Tel. Co. *v.* Pennsylvania, 128 U. S. 39. The tax in these cases was based

gross receipts of the entire business of a corporation, which is engaged in an interstate business, it is unconstitutional, because it is levied in part upon interstate business.[1]

The same rule applies to industrial corporations, which are engaged in an interstate business.[2]

In Postal Tel. Cable Co. *v.* Adams,[3] the court said: It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained. But *property in a State belonging to a corporation*, whether foreign or domestic, engaged in foreign or interstate commerce, *may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situate within the State* (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear

upon the messages, which were sent and delivered by the company within the State. See, also, to same effect, Western Union Tel. Co. *v.* City of Fremont, 43 Neb. 499.

[1] Fargo *v.* Stevens, 121 U. S. 230; Leloup *v.* Port of Mobile, 127 U. S. 472; Lyng *v.* Michigan, 135 U. S. 161; McCall *v.* California, 136 U. S. 104; Norfolk & West. R. R. Co. *v.* Pennsylvania, 136 U. S. 114; Vermont & C. Ry. Co. *v.* Vermont Central Ry. Co., 63 Vt. 1; People *v.* Wemple, 65 Hun, 252; 144 N. Y. 478; State *v.* Woodruff S. & P. Coach Co., 114 Ind. 155.

[2] People *v.* Horn Silver Mining Co., 105 N. Y. 76; In re Tiffany & Co., 80 Hun, 486; Home Ins. Co. *v.* State, 92 N. Y. 328; *s. c.* 134 U. S. 594; Southern Building & Loan Association *v.* Norman (Ky.), 32 S. W. 952.

[3] 155 U. S. 688.

its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment. We are of the opinion that it is within the power of the State to levy a charge upon this company in the form of a franchise tax, but arrived at with reference to the value of its property within the State, and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the State, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

Exports and imports are free from taxation by the State only so long as they are found in that character. Before the article has become an export, or after the original package of the import has been broken and the separate parts of the contents of the original package are offered in trade within the State, they may be subjected to taxation within the State, in common with other property owned within the State, from which they cannot then be distinguished.[1]

§ 220. **State regulation and prohibition of interstate commerce, particularly, articles of merchandise.** — There are two phases of interstate commerce, which are readily suggested by the correlative words, *exports* and *imports*. The sale of the products of domestic labor beyond the limits of the State is just as much a transaction of interstate commerce, as would be the sale within the State of the products of labor done without the State. But before the products of either labor may become the subjects of interstate commerce, steps must have been taken for their sale in or transportation to another State or country. As long, therefore, as the products of domestic labor and manufacture are not set apart for sale to non-resident

[1] In re May, 82 Fed. 422; Nathan *v.* State, 8 How. 73; Brown *v.* Houston, 33 La. Ann. 843; State *v.* North, 27 Mo. 464. As to what is an original package, see, more fully, *post*, § 220.

vendees or for transportation to another State, they may be subjected to any police regulation and restriction, which would not offend the limitations of the State constitutions, without infringing the interstate commerce clause of the national constitution.[1] In this case, the Iowa statute, prohibiting the manufacture and sale of intoxicating liquors, was held not to interfere with interstate commerce, in that it prohibited the manufacture of liquors for export. On the same grounds, a statute, which prohibited the shipment beyond the State of certain fish which was caught within it, was held not to work an interference with interstate commerce, in the constitutional sense of the words.[2]

It has been held to be an unlawful interference with interstate commerce, for a State law to prohibit suit in the State courts on contracts of insurance, which are effected outside of the State with a non-resident or foreign insurance company, unless the insurance company complies with the license law of the State by the payment of the required license tax. The contract of insurance, which is effected by a resident with a foreign insurance company through correspondence with the home office or a non-resident agency, is a contract of the State in which the home office or agency is located, and is, therefore, not governed by the law of the State in which the insured resides. Furthermore, it is an interstate contract, and comes within the purview of the interstate commerce clause of the Federal constitution.[3]

On the other hand, State laws have been sustained, which prohibit the selling of any pool or bets within the State upon any races or games, which are to take place outside of the State, or the establishment within the State of any agency for the sale of such pools or bets,[4] or

[1] Kidd *v.* Pearson, 128 U. S. 1.

[2] State *v.* Northern Pac. Express Co., 58 Minn. 403.

[3] Allgeyer *v.* State of Louisiana, 165 U. S. 578.

[4] State *v.* Stripling, 113 Ala. 120.

for the transmission of money to race tracks outside of the State.[1] In such a case, the contract is wholly made within the State, and for that reason does not fall within the interstate commerce clause of the Federal constitution. So, also, has a State statute been sustained, as not being an interference with interstate commerce, which declares void any stipulation in a contract which provides a shorter period of limitation than two years, or which requires that a notice of claim of damages be given within less than ninety days after suffering the damage.[2]

But the chief instances of police regulations by the State, which interfere with the prosecution of interstate commerce, relate to the importation of merchandise into the State, and the sale thereof within the State, in violation of the local police regulations. Generally these regulations, if they are so excessive as to amount to a burden or restriction upon commerce, are held to be void, and in contravention of the interstate commerce clause of the national constitution. But a disposition is manifested to sustain all reasonable police regulations, which do not restrain or burden the prosecution of the interstate business, and which are designed to protect the purchaser against fraud or injury. Naturally a State law, which only regulated the business in a way which did not prevent its prosecution, is more likely to be sustained than one, which served as a practical barrier to the profitable prosecution of the interstate business. Thus, a State law was held to be constitutional, which required that no lard be sold within the State that contains anything but the pure fat of healthy swine, unless each package is marked "compound lard." [3] And so, also, has the Supreme Court of the United States held a State law to be constitutional, which prohibits the

[1] State *v.* Harbourne, 70 Conn. 484.

[2] Gulf, C. & S. F. Ry. Co. *v.* Eddins, 7 Tex. Civ. App. 116; 26 S. W. 161.

[3] State *v.* Snow, 81 Iowa, 642.

sale of oleomargarine, whether made within or without the State, if it is colored so as to resemble butter in appearance, or if its appearance is not so changed in form or color as to prevent such resemblance.[1] On the other hand, a United States Circuit Court held a Minnesota statute to violate the interstate commerce clause of the national constitution, so far as it was enforced against original packages, which prohibited the sale within the State, of any baking powder which contains alum, unless that fact is stated upon the label of the box or package.[2] In Tennessee, it has been held that the State has the power to prohibit the sale of cigarettes, even in the original package of interstate commerce, because, being deleterious to the health, it was not a legitimate article of commerce.[3]

It has also been held to be a constitutional exercise of the police power of the State, to require that all coal, imported into the State, shall be gauged by State officials, before it can be sold.[4] And provision for the inspection of goods, which are either imported or exported, is held to be a constitutional exercise of the police power.[5]

In the case of all of these regulations, the manifest single intent of the legislator was to protect the purchaser against fraud and imposition, without interfering in the slightest with the fair, straightforward interstate business of an honest man. They are, therefore, sustainable as reasonable police regulations, whose enforcement does not operate as an interference with interstate commerce. But where compliance with the requirements of the statute is impossible to the non-resident trader, and its enforcement

[1] Plumley *v.* Massachusetts, 155 U. S. 461. In this case, the court held the law to be valid in its enforcement against an original package of interstate commerce.

[2] In re Ware, 53 Fed. 783.

[3] Austin *v.* State, 101 Tenn. 563.

[4] Pittsburg & S. Coal Co. *v.* Louisiana, 156 U. S. 590.

[5] Patapoca Guano Co. *v.* Board of Agriculture of North Carolina, 171 U. S. 345.

against him would operate as a practical prohibition of his business — particularly, if the regulation is not impossible of performance to the resident, who is engaged in the same business — the regulation will be declared to be an unconstitutional interference with interstate commerce. Thus a law, which requires the inspection within the State of all live stock, which is slaughtered for sale within the State, cannot be complied with by non-resident stock dealers, and is, therefore, unconstitutional as a restriction upon interstate commerce. And such has been the almost unanimous opinion of the courts.[1]

Probably, for the reason that the motive of the regulation was not a reasonable one, it has been held that a State law, which prohibited the sale within the State of the products of the convict labor of other States, unless they are so labeled, is an unconstitutional interference with interstate commerce.[2] And so, also, because it discriminated without reason against non-resident in favor of resident vendors, a State law, which required the vendors of nursery stock grown in another State to file an affidavit and bond with the Secretary of State, was held to be an unconstitutional restriction upon interstate commerce.[3] It has also been held to be an unreasonable and unlawful interference with interstate commerce, for a State law to require that sheep be "dipped" before being imported into the State.[4]

In like manner, the State government cannot impose conditions upon the sale within the State of articles of interstate commerce, which are not required to protect the

[1] Minnesota *v.* Barber, 136 U. S. 313; Ga. Packing Co. *v.* City of Macon, 60 Fed. 774; State *v.* Klein, 126 Ind. 68; Hoffman *v.* Harvey, 128 Ind. 600; Schmidt *v.* People, 18 Colo. 78; Farris *v.* Henderson, 1 Okla. 384 (33 P. 380).

[2] People *v.* Hawkins, 85 Hun, 43; *s. c.* 47 N. Y. S. 56; 20 App. Div. 494; *s. c.* 157 N. Y. 1.

[3] In re Schechter, 63 Fed. 695.

[4] State *v.* Duckworth (Idaho), 51 P. 456.

health of the community or the reasonable rights of the purchaser. These would be unreasonable; and, because they were unreasonable, they would be declared to be an unlawful interference with interstate commerce.[1] In these cases, the statutes required foreign corporations, doing business within the State, to have a place of business and an agent within the State. It was held that this law could not be enforced against corporations who send goods into the State upon the order of resident buyers, which have been mailed to the home office of the corporation, or which have been given to its traveling salesmen.

Where the police regulation is an absolute prohibition of the importation of articles into the State, the regulation is likely to be declared to be an unconstitutional interference with interstate commerce. This was the case with State statutes, which, like that of the State of Missouri, prohibited absolutely the importation into or through the State of Texan, Indian or Mexican cattle during certain periods of the year. The statute was declared to be unconstitutional by the Supreme Courts of the United States and Missouri.[2] In the latter case, the Supreme Court of the United States stated, in partial explanation of its judgment: —

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers,

[1] Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22; Cook *v.* Rome Brick Co., 98 Ala. 409.

[2] Grimes *v.* Eddy, 126 Mo. 168; Railroad Company *v.* Husen, 95 U. S. 465.

substantially prohibit or ourden either foreign or interstate commerce." * * *

The Illinois courts held such an act to be constitutional.[1]

"Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious diseases, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this, we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal constitution. And as this range sometimes comes very near to the field committed by the constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

In explanation of the distinction made by the national Supreme Court between total prohibition of the transportation of Texas and other Southern cattle into and through the State, and the police provisions for the protection of domestic cattle from contagiously diseased animals, the same court, in a later case, upheld, as a reasonable police regulation, the statute of Iowa which provided that any one, who had in his possession within the State Texas cattle, which had not wintered north of the southern boundary of Missouri and Kansas, shall be liable for any damages which may be suffered by the spreading of the Texas fever among domestic cattle.[2]

In the pursuit of the rigid enforcement of the game laws of a State,[3] the inability to detect breaches of the law, if

[1] Yeazel *v.* Alexander, 58 Ill. 254.

[2] Kimmish *v.* Ball, 129 U. S. 217.

[3] As to these, see *ante*, § 151.

the sale of imported game of the prohibited kind is allowed, led to the extension of the statutory prohibition to all such game, whether it was domestic or imported. A statute of California, absolutely prohibiting the sale of hide or meat of deer during the closed season, was sustained as a lawful exercise of the police power of the State, although it was enforced against importations into the State, provided that the sale of the original package was not interfered with.[1] In another case, the State prohibitive law was sustained, as not a violation of the interstate commerce clause, although it prohibited the sale of the imported game in the original package.[2]

Elsewhere,[3] the curious and, to the author unjustifiable, legislative crusade against oleomargarine, a harmless substitute for butter, is very fully set forth, and the decisions for and against the constitutionality of the laws, prohibitory and regulative of its sale, are there more or less fully treated. These laws must be referred to again in the present connection, because their enforcement has proven to be unsuccessful, as long as the laws cannot prevent or control the sale of oleomargarine, which may be imported into the prohibitory State. All of the cases unite in declaring that a State statute, prohibiting the sale of oleomargarine, cannot prevent the sale of the imported oleomargarine in the original package in which it was shipped into the State; but that as soon as such original package is broken, and the component elements of the original package are offered for sale at retail, they have ceased to be articles of interstate commerce, and have become indistinguishable from the general property, which is subject to the reasonable exercise of the police power of the State. When the original package of oleomargarine, unbroken, is offered for

[1] Ex parte Maier, 103 Cal. 476.

[2] Stevens *v.* State (Md. '99), 43 Atl. 929.

[3] *Ante*, § 122.

sale in a prohibitory State, it is still an article of interstate commerce, and its sale cannot be prevented by State law.[1] But it has been held that, where the police regulation of the sale of oleomargarine does not do more than establish conditions, which are designed, not to prohibit its sale, but only to prevent the practice of deception or fraud in the sale of it for genuine butter, the regulation is constitutional, even when it is enforced against the original package of interstate commerce.[2] But in a recent case, it has been held by the Supreme Court of the United States that the New Hampshire statute, which required oleomargarine to be colored pink, was equivalent to a prohibition of interstate commerce in that article of merchandise when applied to original packages, and was for that reason void and unconstitutional.[3]

The same ruling, distinguishing between the original package of interstate commerce and the broken contents of the same, has been made in the case of State laws which prohibit the sale of cigarettes; the courts holding, that the States have no power to prohibit the sale of cigarettes, imported from another State, when they are offered for sale in the original package in which they had been imported into the State.[4] The same ruling would be made in

[1] State *v.* Gooch, 44 Fed. 276; In re Worther, 58 Fed. 467; In re McAllister, 51 Fed. 282; Ex parte Scott, 66 Fed. 45; Armour Packing Co. *v.* Snyder, 84 Fed. 136; Waterbury *v.* Egan, 23 N. Y. S. 115; 3 Misc. Rep. 355; Commonwealth *v.* Paul, 148 Pa. St. 559; *s. c.* Paul *v.* Pennsylvania, 171 U. S. 1; Commonwealth *v.* Schollenberger, 156 Pa. St. 20; *s. c.* Schollenberger *v.* Pennsylvania, 171 U. S. 1; Fox *v.* State (Md. '99), 43 Atl. 775.

[2] Plumley *v.* Massachusetts, 155 U. S. 471; Commonwealth *v.* Huntley, 156 Mass. 236; In re Plumley, 156 Mass. 236. In this case, the statute required the oleomargarine to be so colored or made as to destroy its resemblance to genuine butter.

[3] Collins *v.* New Hampshire, 171 U. S. 130.

[4] State of Iowa *v.* McGregor, 76 Fed. 956; Sawrie *v.* State of Tennessee, 82 Fed. 615; In re May, 82 Fed. 422; McGregor *v.* Cone, 104 Iowa, 465; State *v.* Goetze, 43 W. Va. 495; Austin *v.* State, 101 Tenn. 563.

the case of any other article of interstate commerce, such as seed [1] or baking powder.[2]

The most important occasion, for determining the proper line of demarcation of the police regulation of a trade which is conceded to a State, and the restraint upon or interference with interstate commerce which is denied by the national constitution, is in the State laws and the constitutional provision, which prohibit the sale of intoxicating liquors.

Two propositions have, as a result of the fruitful litigation over prohibitory laws in this traffic, been definitely settled, particularly by the decisions of the Federal courts. The first is, that no prohibitory law of a State can interfere with the purchase without the State, and the shipment into the prohibitory State, of intoxicating liquors for the purchaser's own use and consumption. Any State law, which interferes with this interstate transaction, either to prohibit it altogether, or to subject it to the police supervision of the State, — as was the case in South Carolina under the dispensary act,[3] requiring a certificate from the State chemist of the purity of the liquors so imported, — is an unconstitutional interference with interstate and extra-state commerce.[4] The second proposition is — or was, until the enactment in 1890 of the so-called "Wilson Bill," which will be explained presently, — that intoxicating liquors, imported into a prohibitory State, may be sold within such State, notwithstanding the prohibitory law, in the original package, in which it was imported; and that such liquors did not come within the prohibition of the State law, until the original package had been broken, and

[1] In re Saunders, 52 Fed. 802.

[2] In re Ware, 53 Fed. 783.

[3] As to which see *ante*, § 131.

[4] Donald *v.* Scott, 67 Fed. 854; *s. c.* 76 Fed. 559; Ex parte Gonzales, 76 Fed. 559; Scott *v.* Donald, 165 U. S. 58; Gardner *v.* Donald, 165 U. S. 58; W. A. Vandercook Co. *v.* Vance, 80 Fed. 786; *s. c.* Vance *v.* W. A. Vandercook Co., 170 U. S. 438.

the contents in a different form or package were offered for sale.[1]

The decision of the Supreme Court of the United States in Leisy *v.* Hardin, sound as it was on the precedents laid down by the earlier cases,[2] created a very natural consternation among the advocates and supporters of laws for the prohibition of the sale of intoxicating liquors; for it dealt a death-blow to their aims and aspirations for the banishment of intemperance from their States and domiciles. The breweries, in order to comply with the judicial determination of what was the original package of interstate commerce, constructed cars for the safe depository of single unpacked bottles of beer; and these cars, with the bottle-rack filled with the unpacked bottles of beer, would be transported to different places within the prohibition States, there side-tracked and opened daily for the transaction of business in the sale of original packages, in the form of single bottles of beer.

The courts had held that the original package of interstate commerce, whose sale within a State cannot be prohibited or restrained by State law, was the package that was delivered to the common carriers for transportation, in the exact condition in which it was shipped. For example in the case of liquors, the bottles, if shipped without any packing, were the original packages; but if they were packed in a box or barrel, or basket, the box, barrel or basket, was the original package, and not the individual bottles.[3] The same ruling would be made in the case of any dry goods. The original case, box or barrel, in which the articles were shipped, would be the original package

[1] In re Lebolt, 77 Fed. 587; Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465; Leisy *v.* Hardin, 135 U. S. 100.

[2] Especially, see Nathan *v.* State, 8 How. 73.

[3] Guckenheimer *v.* Sellers, 81 Fed. 997; Commonwealth *v.* Schollenberger, 156 Pa. St. 201; Schollenberger *v.* Commonwealth of Pennsylvania, 171 U. S. 1; State *v.* Parsons, 124 Mo. 436.

and not the smaller packages, which were packed for shipment in such case, box or barrel. This question has been recently raised in the shipment of cigarettes into States, in which their sale is prohibited by law. The cigarettes, as is well known, are put up in packages of twelve, either in a tin box, or incased in a paper wrapper. It was held by the Supreme Court of Iowa that, where these small packages were packed for shipment in a larger box or crate, the larger box or crate was the original package of interstate commerce, and that the requirement of an internal revenue stamp upon each one of the smaller packages did not make them original packages.[1] In other cases,[2] the same practical conclusion was reached, viz.: that the smaller packages of cigarettes were not so far original packages of interstate commerce, after they had reached their place of destination, as they may be sold in defiance of the prohibitory law of the State; but the court held that, nothwithstanding the conclusion just given, these smaller packages were made original packages, while in course of transportation, by the requirement of a revenue stamp on each one of them. In a Tennessee case, it was held that an open basket, filled with the smaller packages of cigarettes, was the original package, so that the sale of one of the smaller packages would not be the sale of an original package, if it has been shipped into the State in the basket, as described.[3]

The consternation, which the decision in the case of Leisy *v.* Hardin,[4] had occasioned, led to the enactment of what is known as the "Wilson Bill," which reads as follows:—

"That all fermented, distilled or other intoxicating liquors or liquids, transported into any State or Territory, or remaining therein for use, consumption, sale or storage

[1] McGregor *v.* Cone, 104 Iowa, 465.

[2] In re May, 82 Fed. 422; *contra*, Austin *v.* State, 101 Tenn. 563.

[3] Austin *v.* State, 101 Tenn. 563.

[4] 135 U. S. 100.

therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt by reason of being introduced therein in original packages, or otherwise."

This congressional enactment was suggested by a statement in the opinion of Chief Justice Fuller in Leisy *v.* Hardin, as follows: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by an uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled. * * * The conclusion follows that as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress."

The constitutionality of the Wilson bill was denied, on the ground that Congress had not the power under the constitution to delegate to the States the regulation of interstate commerce, which had been placed within the exclusive power of Congress by the interstate commerce clause of the constitution.[1] But the Supreme Court of the United States[2] sustained the Wilson law, claiming that Congress had the power to remove the obstruction to the State regulation of interstate commerce, which the constitutional grant of such power to Congress had created. The court held that, where Congress took no action for the regulation of interstate commerce of a national character, such as is the traffic in intoxicating liquors, its silence must be taken

[1] See, especially, Stoutenburg *v.* Hennick, 129 U. S. 141.

[2] In re Rahrer, 140 U. S. 545.

as equivalent to a declaration that the commerce must be free and untrammeled. "It followed as a corollary that, when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured. Congress has now spoken and declared that imported liquors and liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature. * * * Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." [1]

In a case, growing out of the enforcement of the South Carolina Dispensary Law,[2] which converted the sale of intoxicating liquors into a government monopoly, and prohibited its sale within the State by private dealers, it was held by the United States Circuit Court that the Wilson bill did not apply to a State in which intoxicating liquors were allowed to be sold for consumption as beverage; that, where a State made the liquor business a government monopoly, and forbade the importer of original packages to sell the same, the law was in conflict with the interstate commerce clause of the constitution, and was for that reason void.[3] The Supreme Court, however, did not agree to this distinction, reversed the decision of the Circuit Court, and held that the Wilson law placed intoxicating liquors in original packages within the control of the State laws, whatever those

[1] See, further, in support of the constitutionality of the Wilson law, Scott *v.* Donald, 165 U. S. 58; In re Spickler, 43 Fed. 653; Stevens *v.* State (Ohio, 1900), 56 N. E. 478.

[2] For a full discussion of this law, see *ante*, § 131.

[3] W. A. Vandercook Co. *v.* Vance, 80 Fed. 786.

laws prescribed, in the regulation of the sale of intoxicating liquors. The only practical limitation which the court made in the scope of the Wilson bill, was that no State had the power to prohibit the importation into the State of intoxicating liquors for the purchasers' own use and consumption.[1] It has also been held by the Supreme Court of the United States that intoxicating liquors, imported into a State in which their sale is prohibited, were not brought within the prohibitory law of the State by the Wilson bill, until the carrier had transported them to the place of destination, and had made actual or constructive delivery to the consignee. The State's interference with such transportation, by requiring the carrier, under penalties, to procure a certificate from some State official before the goods could be lawfully delivered to the consignee, was an unconstitutional interference with interstate commerce.[2]

§ 221. **State regulation of railroads and other common carriers, and of their business, when an interference with interstate commerce.** — The railroads, the express companies, the telegraph companies, and other corporations, which establish and furnish the means and facilities for transportation and communication between places, in these days of gigantic combinations, do not and cannot limit their operations by State lines. In the prosecution of their business, most of them traverse more than one State; and by partnerships between connecting lines trunk lines of railroads are formed, which extend from ocean to ocean; whereas, the Western Union Telegraph Company covers the entire country, its electric arteries penetrating every nook and corner. Naturally, their business is partly interstate, and partly intra-state, while the respective cor-

[1] Vance *v.* W. A. Vandercook Co., 170 U. S. 438. See Rhodes *v.* State of Iowa, 170 U. S. 412.

[2] Rhodes *v.* State of Iowa, 170 U. S. 412; reversing *s. c.* State *v.* Rhodes, 90 Iowa, 496.

porations are creatures of State legislation. The corporations, and their business are subject to reasonable police regulations. But the query is appropriate: by which government shall these regulations be established and enforced? The answer is plain, although the application of the principle involved to the particular case may occasion some difficulty. It is that, so far as the regulation interferes with or imposes a burden upon interstate commerce, and involves the exercise of an extra-state power of control over the business of these corporations, it is only valid, if it be exercised by the national government; and it is unconstitutional, if it is exerted by a State government. The police regulation of these corporations, and of their business by a State government, must be confined to those local regulations, which, while they interfere with commerce more or less materially, may be enforced without giving to the State authorities an extra-territorial power of control over these corporations and their business.

The principle, underlying this distinction, is clear enough and easy of comprehension; but it is not always clear, that the courts, in applying this distinction to concrete cases, have adhered to it in deciding, whether a State regulation did or did not constitute an invalid interference with interstate commerce. For example, it has been held in some of the Southern States, that a State statute, which prohibits the running of freight trains on Sunday, did not interfere with interstate commerce, in violation of the United States constitution, although it was enforced against trains which were exclusively laden with freight, which was being transported across the State from one State to another.[1] It is true that, in enforcing such a regulation against "through" freight, the State was not exercising any extra-territorial control over interstate commerce; but it certainly was in-

[1] State *v.* Southern Ry. Co., 119 N. C. 814; Hennington *v.* State, 90 Ga. 396; State *v.* Railroad Co., 24 W. Va. 783. But see *contra*, Norfolk & W. Ry. Co. *v.* Commonwealth, 88 Va. 95.

terfering with the expedition of the interstate business of the railroad. And if the stopping of interstate freight trains on Sundays, by State regulation, was no interference with interstate commerce, a similar prohibition of passenger trains on Sunday would be equally unobjectionable. Elsewhere[1] the constitutionality of Sunday laws in general is fully discussed from the standpoint of religious liberty, to which the reader is referred for a consideration of that phase of the present question.

On the other hand, it has been held that a State law, which requires a railroad to provide separate coaches or cars to be furnished for white and colored passengers, is an unconstitutional interference with interstate commerce, if it is made to apply to passengers, who are to be transported from some point within the State to a point of destination in another State.[2]

If a State statute prohibits a railroad from providing by contract for its exemption from liability for negligence, it is constitutional provided the statute is not applied to contracts, made outside of the State, for transportation from one State into or through another.[3]

On the question, whether railroad service, which is known as "switching," is to such an extent a part of interstate commerce, as that it cannot be subjected to State regulation, where interstate traffic is involved, has been answered in the affirmative by the Texas court,[4] and in the negative by the United States Circuit Court.[5]

It is held not to be in violation of the interstate clause of the constitution, for a State to require by law the

[1] See *ante*, § 68.

[2] State *v.* Hicks (La.), 11 So. 74; Anderson *v.* Louisville & N. Ry. Co., 62 Fed. 46.

[3] Solan *v.* Chicago, M. & St. P. Ry. Co., 95 Iowa, 260; 63 N. W. 692; McCann *v.* Eddy (Mo.), 27 S. W. 541.

[4] Fielder *v.* Mo. K. & T. Ry. Co. (Tex. Civ. App.), 42 S. W. 362.

[5] Chicago, M. & St. P. Ry. Co. *v.* Becker, 32 Fed. 849; State of Iowa *v.* Chicago M. &. St. P. Ry. Co., 33 Fed. 391.

stopping of certain or of all trains at certain stations;[1] to require locomotive engineers to submit to examinations for color blindness and to pay the cost of the examination, even though they are in charge of locomotives which are employed in interstate traffic;[2] to prohibit any railroad from acquiring the control of any parallel or competing lines.[3] So, also, has it been held not to be an interference with interstate commerce for a State statute to prohibit the sale of railroad or steamboat tickets by any but the authorized agents of the carrier which issues them.[4]

The national government has the exclusive power of regulating and controlling the immigration of foreigners into this country, or into any part of it. Naturally, the courts have held that no State can exercise this power, whether Congress has acted or not. A California statute, which prohibited the immigration of the Chinese into the State, and regulated their removal from place to place within the State, was declared to be unconstitutional.[5]

A State may authorize by statute the garnishment of an interstate railroad, without being charged with an unlawful interference with interstate commerce.[6]

In many of the cities, particularly in the Southern States, it is deemed to be prejudicial to the public health to permit the sale of fresh meats, vegetables, fruits and other perishable goods, in any other place than the public market; and the general constitutionality of statutes and ordinances,

[1] State *v.* Gladson, 57 Minn. 385; Lake Shore & M. S. Ry. Co. *v.* State, 8 Ohio C. C. 220.

[2] Smith *v.* State of Alabama, 124 U. S. 465; Nashv. C. & St. L. Ry. Co. *v.* Alabama, 128 U. S. 96.

[3] Louisville & N. Ry. Co. *v.* Commonwealth (Ky.), 31 S. W. 476.

[4] Burdick *v.* People, 149 Ill. 600, 611; State *v.* Corbett, 57 Minn. 345; People *v.* Warden of City Prison, 50 N. Y. S. 56; 26 App. Div. 228. On the general subject of the constitutionality of the so-called anti-ticket scalper's law, see *ante*, § 123.

[5] Ex parte, Ah. Cue, 101 Cal. 197.

[6] Landa *v.* Holck, 129 Mo. 663.

which prohibit their sale elsewhere, has been uniformily sustained.[1] The city of New Orleans has had such an ordinance for many years. But it has been held that an ordinance of the city of New Orleans, which prohibited the railroads from permitting the sale of such perishable food from the cars on its tracks, was an unjustifiable interference with interstate commerce, so far as it was made to apply to articles brought from another State;[2] so, likewise, in a prohibition State, to prohibit the transportation of liquors to a point within the State, unless the railroad has first obtained a certificate from some State official.[3]

Frequently, it is a mooted question, whether a particular transportation of goods or passengers is not a case of interstate traffic. In the first place, the mere fact, that the line of the railroad extends through two or more States, does not make its transportation of goods or passengers an interstate transaction, if the transportation is from one point to another within the same State.[4] And this is likewise true, although, in making such a transportation between two points within the same State, it must be made over a part of the track of the railroad which lies in another State. This is, nevertheless, a case of intra-state transportation, and subject to State regulation.[5] And where a railroad, whose line of road is wholly within the boundaries of a State, engages itself, as a link in any extensive trunk line, to transport goods to the end of its line, there to be delivered to the connecting road — the entire transportation of the goods or passengers to a place of destination beyond the State, being provided for by a contract of a connect-

[1] See *ante*, § 126.

[2] Spellman *v.* City of New Orleans, 45 Fed. 3; Ill. Cent. Ry. Co. *v.* City of New Orleans, 45 Fed. 3.

[3] Rhodes *v.* State of Iowa, 170 U. S. 412; reversing *s. c.* 90 Iowa, 496.

[4] Campbell *v.* Chicago, M. & St. P. Ry. Co., 86 Iowa, 587.

[5] Lehigh Val. Ry. Co. *v.* Pennsylvania, 145 U. S. 192; Seawell *v.* Kansas City, Ft. S. & M. Ry. Co., 119 Mo. 222.

ing road outside of the State, with which the transportation began, — the local road, in the transportation of such goods or passengers, is not so far engaged in interstate commerce, as that it is not subject to the police regulations of the State.[1]

It has been held recently in South Carolina, in the case of a shipment of whisky into the State, in violation of the State Dispensary Law but for the personal use of the consignee, that the interstate transportation had not ceased, and that the goods had not come within the jurisdiction of the State laws, when the consignee was transporting the case of whisky to his home in his own buggy.[2]

The communication or intercourse by telegraph messages, between persons residing or located in different States, is undoubtedly interstate commerce.[3] But, nevertheless, it has been held that there is no unconstitutional interference with interstate commerce, if a State statute regulates the transmission of telegrams, by requiring reasonable facilities for the dispatch of business;[4] or by imposing a specific penalty for the non-delivery of a telegram, which shall be recovered either by the sender[5] or by the person to whom the telegram was addressed.[6] And where the penalty is recoverable by the addressee of the non-delivered telegram, its recovery does not constitute any impairment of the contract of the sender with the telegraph company, which provides against or limits the liability for mistakes in trans-

[1] Ft. Worth & D. C. Ry. Co. *v.* Whitehead, 6 Tex. Civ. App. 595.

[2] State *v.* Holleyman (S. C. '99), 33 S. E. 366.

[3] Reed *v.* Western Union Tel. Co., 59 Mo. App. 168.

[4] Connell *v.* W. U. Tel. Co., 108 Mo. 459.

[5] Western Union Tel. Co. *v.* Tyler, 90 Va. 297; Western Union Tel. Co. *v.* Powell, 94 Va. 268; Western Union Tel. Co. *v.* Mellan, 100 Tenn. 429.

[6] Western Union Tel. Co. *v.* James, 162 U. S. 650; *s. c.* 90 Ga. 254; Western Union Tel. Co. *v.* Howell, 95 Ga. 194; Western Union Tel. Co. *v.* Bright, 90 Va. 778; Butner *v.* Western Union Tel. Co., 2 Okl. 234 (37 P. 1087).

mission.[1] It has also been held that State regulations of telephone companies, for the protection of the local public from threatened danger, did not violate the interstate commerce clause of the Federal constitution.[2]

Elsewhere [3] the general subject of the police regulation of prices and charges, for the prevention of extortion, has been very fully discussed, apart from its effect upon interstate commerce, when it is instituted by the State governments. It remains to refer to these regulations from the standpoint of interstate commerce; and, particularly, to the rates and charges of railroads and other common carriers which are engaged in part in an interstate traffic. The principle controlling these questions is clear, and is the same which has guided the courts in their determination of the scope of the prohibitive influence of the interstate commerce clause of the national constitution. And, when applied to the particular case under inquiry, it declares that the State laws, which undertake to regulate the rates of fare and freight of railroads and other common carriers, are unconstitutional, so far as they are made to apply to the interstate traffic of the railroads. To regulate the rates of fare and freight of railroads, charged by a railroad for transportation from a point in one State to a point in another, is an unconstitutional interference with the national power of control over commerce.[4] And, although it has been held that a

[1] Western Union Tel. Co. *v.* James, 162 U. S. 650.

[2] Michigan Telephone Co. *v.* City of Charlotte, 93 Fed. 11.

[3] See, *ante*, §§ 96, 97, where the general subject is treated, and [illegible] where the regulations of charges of corporations are more particularly discussed.

[4] Kaiser *v.* Ill. Central R. R. Co., 18 Fed. 151; 5 McCrary, [illegible]; Louisville, etc., R. R. Co. *v.* Tenn. R. R. Commissioners, [illegible]; Illinois Central R. R. Co. *v.* Stone, 20 Fed. [illegible]; Pacific Coast S. S. Co. *v.* Cal. R. R. Commissioners, 18 Fed. 10; Carton *v.* Ill. Cent. R. R. Co., [illegible] 44 Am. Rep. 672; *s. c.* 22 Am. Law Reg. (N. S.) [illegible]; Commonwealth *v.* Housatonic R. R. Co., 143 Mass. [illegible]; [illegible] Southern Pac. Ry. Co. *v.* Haas (Tex.), 17 S. W. [illegible] however, where a railroad has entered into a contract with [illegible]

railroad, in transporting goods or passengers from one point to another in the same State, is not engaged in interstate traffic, although the route between the two points is laid across two States, so that such business is within the police regulation of the State;[1] the cases are at variance, whether the State railroad commissioners can under those circumstances fix the charges for transportation between the two points. One case denies the power to do so;[2] the other case holds that it is not a case of interstate commerce, and that it is within the power of the railroad commissioners to regulate the rates and charges of transportation between the two points within the State, although the route lies in part through another State.[3] The latter view is believed to be the correct one.

The State may also regulate the price charged for mileage books, although the railroad line extends beyond the State. But the mileage tickets so sold may be limited by the company to use within the State; and the fact, that they may be tendered to a point without the State, was declared not to make the State law an interference with interstate commerce.[4]

The State courts seem to concur in the opinion that a State does not interfere with interstate commerce, if it imposes a penalty upon a common carrier for refusing to deliver goods to a consignee within the State, upon tender of all the charges for freight which the bill of lading calls for, or for detaining the goods for an unreasonable time

ment, that it will not discriminate in the rates of fare and freight against the inhabitants of that city. Under such a contract, a city ordinance, declaring certain established rates to be discriminative against the city, is not an attempt to interfere with interstate commerce, but the initial step in the enforcement of the railroad's contractual obligation. Iron Mountain Ry. Co. of Memphis *v.* City of Memphis, 96 Fed. 113.

[1] See *ante*, p. 1056 of present section.

[2] State *v.* Chicago, St. P. *v.* M., etc., Ry. Co., 40 Minn. 267.

[3] Commonwealth *v.* Lehigh Val. Ry. Co., 129 Pa. St. 308.

[4] Dillon *v.* Erie Ry. Co., 43 N. Y. S. 320; Smith *v.* Lakeshore & M. S. Ry. Co., 114 Mich. 460.

for any unfounded cause, even though the goods have been shipped from another State.[1] And the same conclusion was reached, where a State law prohibited railroads doing business within the State from increasing their rates, during the course of transportation, above what were charged when the goods were tendered to them.[2] But the Supreme Court of the United States has held such a State regulation to be an interference with interstate commerce, wherever it is applied to interstate freight.[3] It is clear enough, that a State statute cannot provide for the repayment of overcharges on interstate freight, which involved unjust discrimination between points or persons. That is a matter which belongs to the exclusive jurisdiction of the United States government.[4]

The United States government, in the exercise of its power to regulate commerce with foreign nations and between the States, may establish maximum and minimum rates of fare and freight between which all common carriers, doing an interstate business, must keep their charges. In the establishment of the interstate commerce commission, the commission was empowered to regulate railroad traffic, so as to prevent discrimination between points and persons, in the fixing of tariff rates by the railroads, but the power was not given to the commission to establish maximum or minimum or absolute rates of fare and freight; and it was held that the commission could not indirectly attain this control of the charges of the railroads, by first determining what are reasonable rates, and secure a peremptory order from the courts, that the

[1] Gulf, C. & S. F. Ry. Co. *v.* Nelson, 4 Tex. Civ. App. 345; 23 S. W. 732; Bagg *v.* Wilmington C. & A. Ry. Co., 109 N. C. 279.

[2] Chicago, St. L. & P. Ry. Co. *v.* Wolcott, 141 Ind. 267.

[3] Gulf, C. & S. F. Ry. Co. *v.* Helbig, 158 U. S. 98. The specified statute in question was the Texas statute, which prohibited, under a penalty, the charging of more than the rate which was stipulated in the bill of lading.

[4] Gaston *v.* Chicago, R. I. & P. Ry. Co., 95 Iowa, 112

railroads must conform to the commission's determination of what are reasonable charges.[1]

The constitutionality of State regulations of the charges of grain elevators,[2] has been attacked on the ground that, since they constitute one link in the transportation of grain from one State to another, the regulation of their charges involved an unconstitutional interference by the State with interstate commerce. But the Supreme Court of the United States, with a divided court, denied this contention, and sustained the constitutionality of this exercise of the police power of the States.[3] And in Nebraska, it has been held that, as long as Congress does not act in the matter, the States have the power to prevent telegraph companies from discriminating between places in their rates of interstate service.[4]

§ 222. **The jurisdiction of anti-trust laws, national and State, as affected by the interstate commerce clause.** — The general subject of the prohibition of trade combinations has been very fully treated in a previous section.[5] The chief statutory regulations against them are known as "anti-trust laws." We have such laws in almost every State in the Union; and, in addition, we have a national anti-trust law. It is important to delimit the jurisdictions of these national and State laws against trade combinations. Generally, it might be stated, as an accurate delimitation of their jurisdictions, that the State anti-trust laws can apply only to those cases of trade combinations

[1] Cincinnati, N. O. & T. P. Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 184; affirming *s. c.* 21 C. C. A. 54; 74 Fed. 715.

[2] For a full discussion of their constitutionality from the standpoint of the personal liberty of the persons who were engaged in the business, see *ante*, §§ 96, 97.

[3] Budd *v.* People, 143 U. S. 517; Brass *v.* State of North Dakota, 153 U. S. 39 .

[4] Western Union Tel. Co. *v.* Call Pub. Co. (Neb.), 78 N. W. 519.

[5] §§ 110–113.

which do not involve, necessarily and exclusively, the prosecution of interstate commerce. Such a State law cannot be enforced against parties, who violate its provisions by acts committed outside of the State;[1] as, for example, by foreign insurance companies who form a combination outside of the State, which combination determines the rates of premium which shall be charged for insurance within the State.[2] On the other hand, the national anti-trust law can be enforced only against combinations in restraint of trade, which are engaged in interstate commerce. In its application to railroads and other common carriers, whose lines extend over two or more States, it has never been questioned that the national anti-trust law could be enforced against combinations of such common carriers which included within their sphere of operation more than one State. Thus, since the Trans-Missouri Freight Association and the Joint Traffic Association included among its members railroads, which had extensive trunk lines covering a number of the States, the combination was properly held to be in restraint of interstate commerce; and, so far as I know, this position has never been seriously contested.[3]

But the jurisdiction becomes less clear, when the subject of local facilities in aid of interstate transportation, such as grain elevators and live stock yards, is broached in its relation to the national and State antitrust laws. In the case of the grain elevators, it has already been shown in the preceding section[4] that the Supreme Court of the United States had sustained the constitutionality of State laws which regulated the rates of charges of such elevators, because their business was only incidental to interstate

[1] In re Grice, 79 Fed. 627.

[2] State v. Lancashire Fire Ins. Co. (Ark. '99), 51 S. W. 633.

[3] See United States v. Trans-Missouri Freight Association, 166 U. S. 290; United States v. Joint Traffic Association, 171 U. S. 505.

[4] § 221.

commerce, and not a part of it. The same principle has been adhered to in a subsequent case, in which an attempt was made to enforce the provisions of the national anti-trust law against a combination of live stock yard owners at Kansas City, Missouri. The United States Circuit Court held that this association or combination was engaged in interstate commerce; and that their combination, in restraint of such commerce, brought it within the condemnation of the national anti-trust law.[1] But this decision was, on appeal, reversed by the Supreme Court, in harmony with its prior decision in the grain elevator cases.[2]

The practical failure of all the State laws, against trade combinations in restraint of competition, to suppress the formation of gigantic corporate monopolies in the various industries of the country, together with the facilities which some of the States afford for the easy incorporation of such large combinations, led the opponents of the trusts and trade combinations to look to the national anti-trust law for the suppression of those, which were beyond the power of the State laws. The State laws could exclude these industrial monopolies from conducting their business within a State through a local branch office; but the interstate commerce clause of the constitution prevents any interference by a State with the prosecution of their business from an office without the State, or through traveling salesmen and agents. Two cases have been brought into the United States courts, to secure the suppression of these trade combinations by the enforcement of the national anti-trust law. One was directed against a combination of sugar-refineries; the other, against a combination of manufacturers of water and gas pipes. In the case of the sugar refineries, it was held that the combination was not in violation of the national anti-trust laws, although the ultimate effect of

[1] United States *v.* Hopkins, 82 Fed. 529.

[2] Hopkins *v.* United States, 171 U. S. 578.

a successful combination of the sugar refineries of the State might be a restraint upon interstate commerce. But it was held that the manufacture of sugar was not interstate commerce, and hence did not fall within the provisions of the national anti-trust law.[1] In the case of the water and gas pipe combination, the terms of agreement between the manufacturers of pipes involved a partition of the States and Territories between them, and a prohibition against a manufacturer to sell pipe in any State or Territory which had not been allotted to him by the combination. The facts of this case are manifestly different in legal character from the facts of the sugar refineries case, wherein there was no partitioning of territory between rival manufacturers, but a consolidation of the refineries under one corporation. In the United States Circuit Court, it was held that the water and gas pipe combination was not in restraint of interstate commerce, and hence did not come within the condemnation of the national anti-trust law.[2] But this decision has been overruled by the United States Court of Appeals and the United States Supreme Court; both courts holding, that the combination was in restraint of interstate commerce, and did violate the provisions of the national anti-trust law.[3] Mr. Justice Peckham, in delivering the opinion of the Supreme Court, said in part:—

"The direct and immediate result of the combination was necessarily a restraint upon interstate commerce, in respect

[1] United States *v.* E. C. Knight Co., 156 U. S. 1: aff'g 9 C. C. A. 297: 60 Fed. 934. See, also, National Distilling Co. *v.* Cream City Importing Co., 86 Wis. 352, wherein it was held that where both parties to a contract of sale were corporations of the State in which the sale was made, the transaction did not come within the provisions of the national anti-trust law.

[2] United States *v.* Addystone Pipe and Steel Co., 78 Fed. 712.

[3] United States *v.* Addystone Pipe and Steel Co., 85 Fed. 271; 29 C. C. A. 141; *s. c.* Addystone Pipe and Steel Co. *v.* United States (1900), 20 Sup. Ct. Rep. 96.

of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State upon the terms and pursuant to the provisions of such combination. Was not this a direct restraint upon interstate commerce in those goods? If dealers in any commodity agreed among themselves, that any particular territory bounded by State lines should be furnished with such commodities by certain members only of the combination and that the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity was thereby enhanced (as it necessarily would be), the character of the agreement would be still more clearly in restraint of trade.

"Is there any substantial difference where by agreement among themselves the parties choose one of their number to make a bid for the supply of the pipe for delivery in another State, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the demand for the pipe, or to enter into competition for the business? It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they, in fact, did make, and they must be held to have intended the necessary and direct result of their agreement." * * *

"We have no doubt that, where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combine may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary, in

order to render the combination one in restraint of trade. It is the effect of the combination, in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded." * * *

"It is almost needless to add that we do not hold every private enterprise, which may be carried on chiefly or in part by means of interstate shipments, is therefore to be regarded as relegated to interstate commerce, so as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar; that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another State; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of or an illegal interference with interstate commerce. The principle is not affected by anything herein decided."

It seems to me very clear that this latest decision from the Supreme Court of the United States, especially in the light of the Wisconsin decision, cited in a preceding note, paves the way to a very decided national check upon trade combinations in declaring that all corporate combinations, which do in the judicial sense restrain competition and tend to the creation of industrial monopoly, fall within the condemnation of the national anti-trust law, whenever the combination oversteps the boundaries of a State, and include members or industrial plants, that reside or are located in different States. For example, if in the formation of a corporate combination, the manufacturers who are individually doing business in several States, should transfer their plants to the corporation, and they receive shares of stock in return, there is as manifest an intention to restrain competition in interstate commerce, as was evi-

dent in the articles of agreement of the water and gas pipe combination. If this ruling were made by the Supreme court of the United States, very few of the large industrial monopolies, so-called, could successfully plead want of jurisdiction, in a suit against them in the United States Courts for the enforcement of the national anti-trust law. The United States Circuit Court has practically taken this position in a recent case,[1] which a combination, formed of importers and dealers in other States and foreign countries and of local dealers' associations, for the purpose of maintaining prices and preventing ruinous competition, was held to be a violation of the anti-trust law. If this ruling is ultimately sustained by the Supreme Court of the United States, all combinations of foreign or extra-state manufacturers and local dealers will be within the jurisdiction of the United States courts, and in violation of the national anti-trust law.

§ 223. **Control of navigable streams.** — A navigable stream is one of which the public generally may make use in the interests of commerce and social intercourse. It is a highway, like the street or public road, to which every one has the right of access, and which every one may use in any manner consistent with the equal enjoyment of the stream by others. Any exclusive appropriation of the stream,[2] or other interference with the ordinary use of the stream, is a nuisance, which any one may abate, by the removal of the obstructions to navigation, who may feel incommoded thereby.[3]

[1] United States *v.* Coal Dealers Association, 85 Fed. 252.

[2] Commonwealth *v.* Charlestown, 1 Pick. 180; Kean *v.* Stetson, 5 Pick. 492; Arnold *v.* Mundy, 6 N. J. 1; Bird *v.* Smith, 8 Watts, 434.

[3] Inhabitants of Arundel *v.* McCulloch, 10 Mass. 70; Selman *v.* Wolfe, 27 Tex. 78; State *v.* Moffett, 1 Greene (Iowa), 247. In Maine it has been held to be a public right, when the streams are frozen over, to pass over them on foot or in vehicles, which cannot be interfered with, by cutting and removing the ice, without special authority of the State. French *v.* Camp, 18 Me. 433.

The determination of what makes a stream navigable, and consequently public, is a question for the court. The legislature cannot, by legislation, declare a stream navigable, which in fact is not so, for that would in effect be a taking of private property for a public use, which is only possible in the exercise of the right of eminent domain, and upon payment of compensation.[1]

According to the English common law, all streams were navigable in which the tide ebbed and flowed.[2] In England, this is not the arbitrary rule, which it would be, if applied without qualification to the streams of this country. With the exception of the Thames, above tide-water, there are no streams in England which are practically and actually navigable, except those in which the tide ebbs and flows; and there are no tide-water streams of any importance, which are not actually navigable. But in the United States the situation is altogether different. Here, there are fresh-water streams which are navigable, and tidal streams which are not navigable. The application of the common-law rule, in its literal exactness, to the streams of this country would, therefore, result only in absurd conclusions. The courts of this country have been discussing the problem for many years, and have come to different conclusions on the various branches or subdivisions of the question. So far as the question concerns the location of the title to the bed of the stream, it need not be considered in this connection.[3] Here, the question relates to the right of the public to make use of the stream, as a highway. In respect to this phase of the question, the courts very uniformly repudiate the common-

[1] Treat *v.* Lord, 42 Me. 552; Morgan *v.* King, 18 Barb. 284; *s. c.* 35 N. Y. 454; Glover *v.* Powell, 10 N. J. Eq. 211; Baker *v.* Lewis, 33 Pa. St. 301; Weise *v.* Smith, 3 Ore. 445 (8 Am. Rep. 621); American River Water Co. *v.* Amsden, 6 Cal. 443.

[2] Commonwealth *v.* Chapin, 5 Pick. 199; People *v.* Tibbetts, 19 N. Y. 523; Lorman *v.* Benson, 8 Mich. 18.

[3] As to this branch of the question, see Tiedeman on Real Prop., § 835.

law rule, in its literalness, and, seizing hold of the essence of the rule, declare that every stream, which is sufficiently deep and wide to float boats and rafts, used in the interests of commerce and agriculture, is navigable, and the public have a right to use it.[1]

As a general proposition, the power to regulate the use of navigable rivers resides in the States, through which the rivers flow. And the only constitutional limitation upon the State's power of control, as against the United States government, is that which arises by implication from the express grant to Congress of the power to regulate foreign and interstate commerce. Inasmuch as a large part of this commerce is carried on by the use of the navigable streams of the country, it has been uniformly held by the courts, both Federal and State, that the Federal power to regulate commerce includes the power to institute regulations for the use and control of those streams, which are used in the prosecution of foreign and interstate commerce. But, inasmuch as all streams may be used in the carrying on of the domestic commerce, and serve other local interests, the congressional power of control does not exclude State regulation altogether. The power of the State to regulate the streams, which may be used in interstate commerce, is unaffected, as long as Congress does not exercise its power; and, in any case, the State regulations are

[1] The Daniel Ball, 10 Wall. 557; The Montello, 20 Wall. 439; Spring *v.* Russell, 7 Me. 273; Brown *v.* Chadbourne, 31 Me. 9; Ingraham *v.* Wilkinson, 4 Pick. 268; Commonwealth *v.* Alger, 7 Cush. 53; Claremont *v.* Carlton, 2 N. H. 369; Canal Comrs. *v.* People, 5 Wend. 423; People *v.* Platt, 17 Johns. 195; Morgan *v.* King, 25 N. Y. 454; Palmer *v.* Mulligan, 3 Caines, 315; Shrunk *v.* Schuylkill Co., 14 Serg. & R. 71; Cates *v.* Wadlington, 1 McCord, 580; Commissioners, etc., *v.* Withers, 29 Miss. 21; Rhodes *v.* Otis, 33 Ala. 578; Elder *v.* Barnes, 6 Humph. 353; Gavit *v.* Chambers, 3 Ohio, 495; Blanchard *v.* Porter, 11 Ohio, 138; Depew *v.* Board of Comrs., etc., 5 Ind. 8; Board of Comrs. *v.* Pidge, 5 Ind. 13; Moore *v.* Sanborn, 2 Mich. 519; Dorman *v.* Benson, 8 Mich. 18; Middleton *v.* Pritchard, 4 Ill. 560; McManus *v.* Carmichael, 3 Iowa, 1; Weise *v.* Smith, 3 Ore. 445 (8 Am. Rep. 621).

void only as far as they conflict with the regulations of Congress.[1]

In the absence, therefore, of congressional legislation, the State may regulate the conduct and management of ships, their speed, etc., while making use of these watery highways; and the only other limitation upon the power of the State, which may be suggested by a study of police power in general, is that the regulation must be reasonable, as tending to prevent an injurious use of the stream.[2] Thus, in order to prevent damage to vessels from a loose and careless floating of logs down the stream, the State may provide by law that the logs shall be bound together into rafts or inclosed in boats, and be placed under the control and supervision of men, who are required to be reasonably skilled in the management of rafts, and to be actually in charge of them.[3] It has been held to be within the police power of the State to prohibit the removal of logs, which have been washed ashore on a navigable stream, without paying to the owner of the shore a certain sum for each log; and to provide for the sale of the logs by the landowner, if the owner of the logs refuses to make payment, or if he cannot be found, to appropriate to himself, out of the proceeds of sale, the permitted amount for each log so sold.[4]

[1] Cooley Const. Lim. 730; Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245; Wheeling Bridge Case, 13 How. 518; *s. c.* 18 How. 421; Gilman *v.* Philadelphia, 3 Wall. 713; Withers *v.* Buckley, 20 How. 84; Gibbons *v.* Ogden, 9 Wheat. 1; Escanaba Company *v.* Chicago, 107 U. S. 678. Rumsey *v.* N. Y. & N. E. Ry. Co., 63 N. Y. 200. Under the power to regulate commerce, Congress may regulate the sale, mortgage, etc., of United States vessels engaged in interstate trade. Shaw *v.* McCandless, 36 Miss. 296. As to how far State legislatures may authorize condemnation of ships as unseaworthy by tribunals constituted by State authority, in absence of any general regulation made by Congress, see Janney *v.* Columbus Ins. Co., 10 Wheat. 418.

[2] See people *v.* Jenkins, 1 Hill, 469; People *v.* Roe, 1 Hill, 470.

[3] Craig *v.* Kline, 65 Pa. St. 399 (3 Am. Rep. 636). See Harrigan *v.* Conn. River Lumber Co., 129 Mass. 580 (37 Am. Rep. 387).

[4] Henry *v.* Roberts, 50 Fed. 902.

In like manner are the fisheries in a navigable stream subject to police regulation of the State. Thus, it was held to be constitutional for a State to forbid non-residents to catch fish, for the manufacture of manure and oil, in the navigable waters of the State.[1]

Where the United States government has issued coasting licenses to vessels, to engage in interstate commerce on certain navigable streams, no State law can interfere with the enjoyment of the license, by granting to one or more persons the exclusive privilege of navigating the streams in question.[2] Thus, an act of Maryland was not sustained, which prohibited the use of vessels in the oyster trade on the Chesapeake Bay, unless the owner had procured a license from the State authorities, and had paid a tonnage tax. The act was held to be unconstitutional, not only because it exacted a tonnage tax, in violation of the United States Constitution; but, also, because it interfered with the right to carry on the business of the owners of vessels, which were licensed and enrolled by the United States government.[3]

But except so far as the stream may be used, or is susceptible of use, in interstate or foreign commerce, it is within the police power of the State to grant exclusive rights to its use.[4] This right of granting exclusive privileges in the use of a navigable stream is very commonly exercised in the creation of ferries, and the grant of exclusive ferry

[1] Brothers *v.* Church, 14 R. I. 398 (51 Am. Rep. 410). See, generally, People *v.* Reed, 47 Barb. 235; Phipps *v.* State, 22 Md. 380; Gentile *v.* State, 29 Ind. 409.

[2] Gibbons *v.* Ogden, 9 Wheat. 1; Ogden *v.* Gibbons, 4 Johns Ch. 150; *s. c.* 17 Johns. 488; Steamboat Company *v.* Livingston, 3 Cow. 713. See Gilman *v.* Philadelphia, 3 Wall. 713; The Daniel Ball, 10 Wall. 557.

[3] Booth *v.* Lloyd, 33 Fed. 593; Ex parte Insley, 33 Fed. 680.

[4] Veazie *v.* Moor, 14 How. 568. In this case the stream, over which the exclusive privilege extended, was that part of the Penobscot river, which was intercepted from communication by boats with the sea by a fall and several dams, and consequently was not susceptible of use in interstate commerce. See, also, People *v.* Tibbetts, 19 N. Y. 523; Livingston *v.* Van Ingen, 9 Johns. 50; McReynolds *v.* Smallhouse, 8 Bush, 447.

privileges. The establishment of a ferry across a navigable stream does not materially interfere with the ordinary navigation of the stream; and, consequently, the power of the State to create and regulate ferries in no case conflicts with the police control of Congress over navigable streams, unless Congress should by actual legislation, in the exercise of its power, supersede the subordinate State control.[1] Not only may the State grant an exclusive privilege to the navigation of a stream, but it may grant an exclusive privilege to fish in the stream,[2] or to cut ice when the river is frozen over. It is also a common exercise of proprietary power, in South Carolina, for the State to grant to corporations and individuals the exclusive right to dig phosphate rock in the beds of the navigable streams of the State.

The State has also the power to improve the navigable streams of the State, or to authorize private corporations and individuals to make the improvements, and charge toll of those who make use of the stream, as compensation for the improvements. This is but a reasonable exercise of police power, and the coasting licenses of the United States government create no exemption from liability to the regulation. All vessels may alike be required to pay toll.[3]

[1] Conway *v.* Taylor's Ex'r, 1 Black, 603; Fanning *v.* Gregorie, 16 How. 524; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Parker *v.* Metropolitan, etc., R. R. Co., 109 Mass. 506; People *v.* Mayor, etc , of New York, 32 Barb. 102; Chilvers *v.* People, 11 Mich. 43; Marshall *v.* Grimes, 41 Miss. 27; Carroll *v.* Campbell, 108 Mo. 550.

[2] See Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85 (35 Am. Rep. 602).

[3] See, generally, Thames Bank *v.* Lovell, 18 Conn. 500; Kellogg *v.* Union Co., 12 Conn. 6; Zimmerman *v* Union Canal Co., 1 Watts & S. 346; Benjamin *v.* Manistee, etc., Co., 42 Mich. 628; Nelson *v.* Sheboygan Nav. Co , 4 Mich. 7 (38 Am. Dec. 222); Wisconsin River Improvement Co. *v.* Manson, 43 Wis. 255 (28 Am. Rep. 542); McReynolds *v.* Smallhouse, 8 Bush, 447; Carondelet Canal, etc., Co. *v.* Parker, 29 La. Ann. 430 (29 Am. Rep. 339); Huse *v.* Glover, 119 U. S. 543; Stockton *v.* Powell, 29 Fla. 1.

It has thus been held to be no violation of the Federal constitution for the State of Louisiana to authorize its levee district authorities to make proper provisions for the protection of its shores against inundations and overflows of the Mississippi river, even though it becomes necessary to go into the State of Arkansas, in order to make the proper provisions, provided it is done with the proper consent of the Arkansas government.[1] But it is not within the power of the State to grant to private persons lands under tide waters, with the power to build dykes for the reclamation of the submerged lands: for that would be an interference with the navigable waters of the State.[2] And, wherever Congress so wills it, it has the absolute power, in the interest of interstate and foreign commerce, to declare what may or may not constitute unlawful obstructions to the navigation of all the navigable waters, which are at all serviceable in the prosecution of interstate commerce. And Congress may make provisions for the removal of all prohibited obstructions, which provisions of law shall remove the questions from the jurisdiction of the States.[3]

The State has also the power to authorize the construction of bridges across the navigable streams within its border; and if the stream is not one, that is or can be used in foreign and interstate commerce, the power of the State to authorize its construction can in no case be questioned, because the bridge will materially interfere with the ordinary navigation of the stream. The legislative determination of the public needs cannot in such a case be controlled by the judicial discretion.[4] The State may also license the construction of piers, extending into the current

[1] Fisher *v.* Steele, 39 La. Ann. 447.

[2] Coxe *v.* State, 144 N. Y. 396.

[3] United States *v.* North Bloomfield Gravel Mining Co., 81 Fed. 243.

[4] Commonwealth *v.* Breed, 4 Pick. 460; Dover *v.* Portsmouth Bridge, 17 N. H. 200; Depew *v.* Trustees of W. & E. Canal, 5 Ind. 8; Illinois, etc., Co. *v.* Peoria Bridge, 28 Ill. 467; Chicago *v.* McGinn, 51 Ill. 266 (2 Am. Rep. 295).

of the navigable stream; and it has been held that one is not entitled to damages for injury to his fishery, resulting from the construction of the pier.[1]

In respect to the streams, which are subject to the control of Congress, because they are used in the conduct of interstate commerce, the authority to construct a bridge may be granted by Congress or by the State legislature. If Congress grants the authority, the interference of the bridge with interstate commerce will constitute no objection to the legality of the structure, — the determination of Congress that it causes only a reasonable interference with the navigation of the stream being conclusive, in the same manner as a like determination of the State legislatures is, in respect to bridges over streams not adapted for use in interstate commerce. But if the State legislature authorize the construction of a bridge over a stream used in interstate commerce, — inasmuch as the interference with interstate commerce by the State is only permissive, and secondary to the primary control of Congress, — the judgment of the legislature, that the bridge causes only a reasonable interference with navigation, which is justifiable by the increased facilities for rapid transportation which the bridge affords, is not conclusive, and the ultimate decision, in the absence of congressional action, rests with the Federal courts, who are deemed to have the power to pass upon the reasonableness of the interference with navigation, and to cause the bridge to be removed, if it is found to interfere materially with the use of the stream in foreign or interstate commerce.[2] But, even after a bridge has been condemned by

[1] Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85 (35 Am. Rep. 632).

[2] Wheeling Bridge Case, 13 How. 518; Columbus Ins. Co. *v.* Peoria Bridge Co., 6 McLean, 70; Columbus Ins Co. *v.* Peoria Bridge Co., 6 McLean, 209; Jolly *v.* Terre Haute Drawbridge Co., 6 McLean, 237; United States *v.* New Bedford Bridge, 1 W. & M. 401; Commissioners of St. Joseph Co. *v.* Pidge, 5 Ind. 13; Decker *v.* Balt. & N. Y. R. Co., 30 Fed. Rep. 723. Stockton *v.* Balt. & N. Y. Ry. Co., U. S. C. C. 32 Fed. 9; Rhea *v.* Newport, N. & M. V. Ry. Co., 50 Fed. 16; State *v.*

the court because of its unreasonable interference with interstate commerce, Congress may interpose, in the exercise of its power to regulate commerce, and declare the bridge to be a lawful structure.[1]

Where a bridge is constructed across a river which separates two States, the use of that bridge is necessarily interstate commerce. Hence, while the States, on whose shores the piers and approaches of the bridge are constructed, may levy a tax upon the intangible property of the bridge company; [2] the police power of neither State covers the management and control of the bridge itself; so that neither State can regulate the tolls which the bridge company might charge for the use of the bridge. Congress alone can exercise this police control of the bridge.[3]

These interferences with the general navigation of a stream by the public do not constitute a limitation of the State control of streams, which cannot be used for foreign and interstate commerce. Congress has no control over these streams, and it seems to be the universally recognized

Leighton, 83 Me. 419; Green & B. R. Nav. Co. *v.* Chesapeake & S. W. Ry. Co., 88 Ky. 1 (State authorizing temporary obstruction of navigable river for the repair of the railroad bridge); Winifrede Coal Co. *v.* Central Railway and Bridge Co. (Ohio), 24 Wkly. Law Bul. 173; Pennsylvania Ry. Co. *v.* Baltimore and N. Y. Ry. Co., 37 Fed. 129 (congressional grant of the right to construction of a bridge without the consent, and against the protest, of the State); Luxton *v.* North River Bridge Co., 153 U. S. 525; Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150. It has been held that Congress cannot delegate to the Secretary of War, or to any other administrative officer, the power to determine whether a bridge over a navigable stream is an obstruction to interstate commerce, and, upon reaching such an adverse determination, to cause it to be removed, or so reconstructed, as that the bridge will cease to be an obstruction. United States *v.* Rider, 50 Fed. 406; U. S. *v.* Keokuk and H. Bridge Co., 45 Fed. 178.

[1] Wheeling Bridge Case, 18 How. 421.

[2] Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150.

[3] Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204; reversing Commonwealth *v.* Covington & C. Bridge Co. (Ky.), 21 S. W. 1042; Covington & C. El. Railroad & Transfer Bridge Co. *v.* Kentucky, 154 U. S. 224; reversing *s. c.* (Ky.) 22 S. W. 851.

rule that there is no limit to the power of the State to regulate their use. It is even held to be lawful to obstruct such a stream by the erection of dams, even to the extent of prohibiting navigation altogether. If the person who constructs the dam keeps within the authority given him, he is in no way responsible to those who may be damaged by the obstruction.[1]

§ 224. **Regulation of harbors — Pilotage laws.** — Under the constitutional grant to the United States of the power to regulate foreign and interstate commerce is included, also, the power to regulate the harbors, and the conduct and management of ships within the harbors. But as long as Congress does not exercise this implied power, it rests with the States to provide all those local regulations of the use of harbors, which are aids to commerce rather than restrictions or interferences, and which go far towards eliminating the chances of injurious accidents which are more or less present in the absence of police regulations. Thus, it is lawful for the State or municipal corporation to prescribe when a vessel may lie in the harbor, how long she may remain there, what light she must show at night, and establish other similar regulations, without coming into conflict with any law of Congress.[2] So, also, has it been held

[1] Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245; Parker *v.* Cutler Mill Dam Co., 21 Me. 353; People *v.* Vanderbilt, 28 N. Y. 396; Hinchman *v.* Patterson, etc., R. R. Co., 17 N. J. Eq. 75; Roush *v.* Walter, 10 Watts 86; Zimmerman *v.* Union Canal Co., 1 Watts & S. 346; Brown *v.* Commonwealth, 3 Serg. & R. 273; Bailey *v.* Phila., etc., R. R. Co., 4 Harr. 389; Hogg *v.* Zanesville Co., 5 Ohio, 257; Depew *v.* Trustees of W. & E. Canal Co., 5 Ind. 8; Neaderhouser *v.* State, 28 Ind. 257; Stoughton *v.* State, 5 Wis. 291; Commissioners *v.* Withers, 29 Miss. 21; Eldridge *v.* Cowell, 4 Cal. 80.

[2] The James Gray *v.* The John Fraser, 21 How. 421. See Mobile *v.* Kimball, 102 U. S. 691; Escanaba Company *v.* Chicago, 107 U. S. 678. In Vanderbilt *v.* Adams, 7 Cow. 349, an act of the legislature of New York was sustained as constitutional, which authorized the harbor-masters of the city of New York to regulate the moorings and movements of all ships and vessels in the current of the East and North Rivers,

within the police power of the State, to forbid the sale of coal, imported into the State in barges, until the coal has been gauged by the State gaugers.[1] On the other hand, it has been held to be an unconstitutional interference with interstate commerce, for a State, in the exercise of its police power, to prohibit the crews of foreign vessels from loading or unloading vessels in the harbors of the State.[2]

It is also lawful for a city, so far as the Federal authority is concerned, to require the payment of a tax or license fee from all boats coming into the harbor, or mooring at the city landings. The imposition of such a tax does not constitute an interference with interstate commerce in the constitutional sense.[3] It has, however, been held recently by the United States Supreme Court, that the boats, which are engaged in interstate commerce, such as tugs in a harbor, which are employed in towing vessels into or out of the harbor and rivers of a State, cannot be subjected to liability to the State or city for the payment of any license tax, if such boats possess a license from the United States government to engage in the coasting and foreign trade.[4]

But all charges laid by the local authorities for the enjoyment of the facilities furnished to vessels, must be so computed as not to constitute a tonnage duty. By the United States constitution,[5] the States are prohibited from

and to remove from the wharves such vessels as were not employed in discharging or receiving freight, in order to make room for vessels, waiting for an opportunity to come up to the wharf.

[1] Pittsburg & S. Coal Co. *v.* Louisiana, 156 U. S. 590.

[2] Cuban S. S. Co. *v.* Fitzpatrick, 66 Fed. 63.

[3] Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365; Wheeler, etc., Transportation Co. *v.* City of Wheeling, 9 W. Va. 170 (27 Am. Rep. 552); City of New Orleans *v.* Eclipse Towboat Co., 33 La. Ann. 647 (39 Am. Rep. 279).

[4] Harmon *v.* City of Chicago, 147 U. S. 396; reversing *s. c.* City of Chicago *v.* Harmon, 37 Ill. App. 496; 140 Ill. 374; following Gibbons *v.* Ogden, 9 Wheat. 210; Foster *v.* Davenport, 22 How. 244; Moran *v.* New Orleans, 112 U. S. 69; and distinguishing Huse *v.* Glover, 119 U. S. 543; Sands *v.* Improvement Co., 123 U. S. 288.

[5] Art. I., § 10, ch. 3.

laying any tonnage of duty without the consent of Congress. For example, the State board of harbor commissioners for the port of Charleston, South Carolina, under the authority given by the State to levy fees and port charges to defray the expenses of the police regulation of the harbor, imposed a scale of charges on vessels entering the port according to the "length over all" in feet. It was held by the Supreme Court of the State that the charges were unlawful, because they were a tonnage duty.[1] And the Supreme Court of Louisiana held that a license tax, which was imposed by the State, and graduated according to gross receipts, is void as a State regulation of interstate commerce.[2] But on the other hand, it has been held by the Supreme Court of the United States that the charge for the use of the wharf is not unlawful, as being a tonnage duty, because the amount of the fees is regulated according to the tonnage of freight.[3]

But the harbor charges must be reasonable, and be imposed in consideration of some service rendered, or benefit received. If the law provides for the exaction of certain fees from all the vessels entering the harbor, whether any service is rendered to it or not, the law is unconstitutional as being a restriction upon commerce.[4]

Another very important police regulation of commerce consists in the pilotage laws. Every ordinary sailing master is able to convey his vessel with safety in the open sea to any part of the world. His general knowledge of the science of navigation is a sufficient guaranty of safety to all on board. But a special knowledge of the shoals and cur-

[1] Harbor Commissioners *v.* Pashley, 19 S. C. 315. See Inman Steamship Co. *v.* Tinker, 94 U. S. 238.

[2] Frere *v.* Von Schoeller, 47 La. Ann. 334.

[3] Packet Company *v.* Keokuk, 95 U. S. 80; People *v.* Roberts, 92 Cal. 659.

[4] Webb *v.* Dunn, 18 Fla. 721; see Harmon *v.* City of Chicago, 147 U. S. 396; reversing *s. c.* City of Chicago *v.* Harmon, 37 Ill. App. 496; 140 Ill. 374.

rents of a harbor is necessary, in order that it may be entered with safety, and for this reason, it is the universal custom of all civilized nations to require that all vessels, in entering a harbor, shall be in charge of a pilot, specially licensed by the State; or, at least, to provide such pilots for the use of those who may desire their services, under the power to regulate commerce. Congress clearly possesses the right to establish pilot regulations. But as long as Congress does not assume this power, it is but reasonable to conclude that the States may exercise the power, as they had done before the formation of the present union.

In order to remove all doubt as to the power of the States to establish pilot regulations, the first Congress passed this act: —

"All pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." [1]

Notwithstanding this statutory declaration, the State pilotage laws have frequently been attacked, for being an invasion of the power of Congress; but they have been uniformly sustained in the absence of regulations by Congress.[2] The only regulation of pilots established by Congress, is that contained in an act of Congress, passed in 1837, which is as follows: —

"That it shall be lawful for the master or commander of any vessel coming in or going out of any port situated upon waters, which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot

[1] U. S. Rev. Stat. 4235.

[2] Cooley *v.* Wardens, 12 How. 299; Ex parte McNiell, 13 Wall. 236; The Panama, Deady, 27; Ex parte Siebold, 100 U. S. 385; Wilson *v.* McNamee, 102 U. S. 572; State *v.* Penny, 19 S. C. 218.

said vessel to or from said port; any law, usage or custom to the contrary notwithstanding." [1]

It is lawful for the States to exact the payment of pilotage fees, in whole or in part, by those owners or masters of vessels, who decline the service of a pilot, for it is within the power of the State to compel every vessel on entering a harbor of the State, to accept the service of a licensed pilot.[2] Nor is it any violation of the provisions of the constitution for a State to discriminate in the amount of pilotage between vessels in foreign commerce and those which are engaged in the coasting trade.[3] It has also been held lawful for a State to require the masters of vessels bound to ports in that State to accept the services of the first licensed pilot who offers himself.[4]

§ 225. **National and State quarantine laws.** — It is, probably, not open to serious question that, whenever Congress undertakes to establish a general system of quarantine for the promotion of the general health of the country, and for the prevention of the introduction into the country of infectious and contagious diseases by diseased persons and animals, and infected goods, coming from foreign countries or other States, the regulations of Congress will supersede altogether the regulations of the State governments; and the jurisdiction of the States in such matters will be taken away completely. But, until Congress so acts, it is equally clear that the States may prescribe quarantine laws for the detention of vessels or railroad trains, on their entrance into a harbor or station, respectively, whenever for any reason the landing of the passengers, or the discharge of the cargo or freight, is likely to endanger

[1] U. S. Rev. Stat. 4236. See Henderson *v.* Spofford, 59 N. Y. 131.

[2] Cooley *v.* Wardens, 12 How. 299.

[3] Collins *v.* Relief Society, 73 Pa. St. 94; Freeman *v.* The Undaunted, 37 Fed. 662. See Cooley *v.* Wardens, 12 How. 299.

[4] Thompson *v.* Spraigue, 69 Ga. 409 (47 Am. Rep. 760).

the health of the city or State.[1] This detention of passengers, as a prevention against contagious diseases, is justifiable, even though they may not have come from an infected place, provided they have traveled with those who did come from the infected localities.[2] And the expense of detention and fumigation may be justly and lawfully laid upon the common carrier.[3]

But this extraordinary interference of the States with interstate traffic and commerce is confined to such measures, and to the cases in which such measures, as promise to protect the health of the people of the State or city. As has already been shown, the State cannot, for the protection of domestic cattle, prohibit altogether the importation into the State of cattle which may be afflicted with a contagious disease, such as Texas fever, or which carry with them into the States the germs of the disease.[4] And it has also been held that a State cannot, for the prevention of the increase of the burden of pauperism, require common carriers, which bring indigent people into the State, to remove them from the State, if they should fall into distress within one year after their arrival. This is a regulation of foreign and interstate commerce, which the United States Government can alone institute and enforce.[5]

[1] License Cases, 5 How. 504, 632; Railroad Co. *v.* Husen, 95 U. S. 465; Brown *v.* Maryland, 12 Wheat. 419; Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Milner, 57 Fed. 276; Train *v.* Boston Disinfecting Co., 144 Mass. 523. In St. Louis *v.* McCoy, 18 Mo. 238, an ordinance of the city of St. Louis was sustained, which prescribed that boats coming from below Memphis, and having had on board, at any time, during the voyage, more than a specified number of passengers, should remain in quarantine for a specified period. See, also, St. Louis *v.* Boffinger, 18 Mo. 13.

[2] Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Milner, 57 Fed. 276.

[3] Minneapolis, St. P. & S. S. M. Ry. Co. *v.* Milner, 57 Fed. 276; Train *v.* Boston Disinfecting Co., 144 Mass. 523.

[4] See *ante*, § 220, and the cases there cited.

[5] City of Bangor *v.* Smith, 83 Me. 422.

§ 226. **Regulation of weights and measures.** — Congress is given the power "to fix the standard of weights and measures."[1] The grant of power excludes the like power of the States, whenever Congress exercises the power; but, until Congress does, there can be no constitutional objection to the regulation of these subjects by the States.[2]

§ 227. **Counterfeiting of coins and currency.** — It is also declared by the national constitution, that Congress may "provide for the punishment of counterfeiting the securities and current coin of the United States."[3] There is no need of an express grant of this power, for it would be necessarily implied from the grant of power to regulate the coinage and currency of the United States.[4] But the offense of counterfeiting is not only a crime against the United States government, but is also a trespass upon the rights of those who are induced to receive the counterfeit coin. The punishment of the offense against the government clearly comes within the jurisdiction of the United States. But, in the absence of an express prohibition, it would be competent for a State to punish counterfeiting, as an offense against the individual.[5] Congress has lately passed an act providing for the punishment of counterfeiting the coins and currency of foreign nations; and a prosecution has been instituted in the United States Court at St. Louis, in a case in which a band of counterfeiters were convicted of the crime of counterfeiting the currency of Brazil. The constitutionality of the statute was attacked on the ground, that the power to punish the coun-

[1] U. S. Const., art. I., § 8, cl. 5.

[2] Weaver *v.* Fegely, 29 Pa. St. 27.

[3] U. S. Const., art. I., § 8, cl. 6.

[4] Story on Constitution, § 1123.

[5] Fox *v.* Ohio, 5 How. 410. See United States *v.* Marigold, 9 How. 560; Moore *v.* Illinois, 14 How. 13.

terfeiting of foreign coin was not granted by the constitution, nor could it be implied from any express power; but the validity of the statute was sustained on the ground, that the power to enact it was included in the grant of the power to define and punish "offenses against the law of nations."[1] There can be no doubt of the correctness of this decision.[2]

When the wrong done to the individual, by receiving a counterfeit bill or coin, is alone considered, it is clearly a subject for the State police regulation, and cannot be considered a subject for Congressional legislation, whether the coin that is counterfeited is foreign or domestic. But when the wrong to the government, whose coin or currency is counterfeited, is considered, the character of the offense is changed. Instead of being a subject of internal police regulation, exclusively, it constitutes a subject of international law. It is an offense against the law of nations. And although it might not be declared to be so by the existing code of international law, Congress is given the power to *define*, as well as punish, offenses against the law of nations, and it can undoubtedly, in the exercise of this power, provide for punishing the counterfeiting of foreign coin. The exercise by Congress of this implied power will not exclude the States from the exercise of their ordinary police power over the offense against the individual who has been wronged by the deception.

§ 228. **Regulation of the sale of patented articles.** — The constitution of the United States contains also a provision,[3] authorizing Congress to promote inventions by providing for the issue of exclusive patent rights to inventors. The power has been exercised, and the number of patented articles offered for sale in the United States is legion. In

[1] U. S. Const., art. I., § 8, cl. 10.

[2] This was affirmed in United States *v.* Arjona, 120 U. S. 479.

[3] United States Const., art. I., § 8, cl. 8.

the exercise of the police power over trades and professions, the States very frequently establish regulations, which directly or indirectly interfere with or restrict the sale of patented articles, and the constitutionality of such regulations has often been questioned on that account. But they have been generally sustained, if they were in other respects free from constitutional objection. Thus, it was held to be lawful to restrain the sale of adulterated provisions without a stamp, although the article sold was patented. Congress cannot grant under the patent law the right to practice deception in the sale of adulterated articles;[1] and if the adulterated article is injurious, when used in the manner for which it was intended, the sale of it may be prohibited altogether.[2] But, unless there is fraud or deception in the manufacture of the patented article, it is very probable that the State could not nullify the patent by a prohibition of the sale of the patented article, on the ground that its sale involves elements of danger to the public.

Within this limitation, however, the sale of the patented article is subject to reasonable regulation by the State. For example, for the purpose of preventing fraudulent practices in the sale of patent rights, it was provided by statute in Indiana that vendors of patent rights shall file with the county clerk an authenticated copy of the letters-patent, with an affidavit that they are genuine and have not been revoked or annulled, and that the vendors have authority to sell. The statute was sustained as not being in violation of the rights of the patentee, nor an invasion of

[1] Palmer *v.* State, 39 Ohio St. 236 (48 Am. Rep. 429). As to the general right of the State to regulate the sale of patented articles, see Jordan *v.* Overseers, 4 Ohio, 295; In re Brosnahan, 4 McCrary C. C. 1 (18 Fed. Rep. 62); Patterson *v.* Kentucky, 97 U. S. 501; Webber *v.* Virginia, 103 U. S. 344. See *ante*, pp. 412, 413, where it is explained how far patented articles may be controlled by the anti-trust laws of the State.

[2] Patterson *v.* Kentucky, 97 U. S. 501.

the jurisdiction of Congress.[1] But a State law was declared in Nebraska to be unconstitutional, which provided that no one shall sell any patent right within the State until he has first submitted his letters-patent to a county judge and obtained his approval.[2] It is also held to be constitutional for a State to impose a license tax upon the sale of patented articles by an ordinary trader, as, for example, peddlers of sewing machines.[3] But it seems to be considered unconstitutional for a State to impose a license tax upon the sale by the patentee of his patented article.[4]

§ 229. **War and rebellion.**[5]— It is provided by the constitution that Congress shall have the power "to declare war, to grant letters of marque and reprisal, and make rules concerning captures on land and water."[6] We are not concerned in this connection with the general war powers of the government, except so far as the exercise of them bears upon the citizens of the United States. Under the authority "to grant letters of marque and reprisal, and make rules concerning captures on land and water," it is held to be a legitimate means of prosecuting war to seize and confiscate the property of the enemy, and this right is also claimed for the United States against its citizens who have engaged in rebellion.[7] On the same ground, it has been held to be lawful as a war measure, to emancipate by proclamation the slaves of those who are engaged in rebel-

[1] Brechbill *v.* Randall, 102 Ind. 528 (52 Am. Rep. 695).

[2] Welch *v.* Phelps, 14 Neb. 134.

[3] Howe Machine Co. *v.* Gage, 100 U. S. 676.

[4] State *v.* Butler, 3 Lea (Tenn.), 222.

[5] See Chapter VII, Tiedeman's Unwritten Constitution of the United States, for a critical discussion of constitutional limitations in time of war, and of the value as a precedent of the case of Ex parte Mulligan, 4 Wall. 2, which is also cited in the present section.

[6] U. S. Const., art. I., § 8, cl. 11.

[7] Miller *v.* United States, 11 Wall. 268; Tyler *v.* Defrees, 11 Wall. 331; The Grape Shot, 9 Wall. 129; The Prize Cases, 2 Black, 635.

lion.[1] Congress may also in the suppression of a rebellion establish military tribunals for the trial of military offenses in those sections of the country which constitute the seat of war, and where in consequence civil law is superseded by military law. But where the courts of the country are open for the hearing of criminal offenses, and hostilities are not in such close proximity as to prevent the courts from enforcing their decrees, the jurisdiction of the civil courts cannot be invaded by a military court.[2]

In further support of the war power of the United States, Congress is empowered to "raise and support armies."[3] The manner of "raising" an army, the mode of enlistment, must be determined by acts of Congress. As long as the enlistments are voluntary, no constitutional question can arise. Although it has been questioned whether the government could make forced enlistments, it cannot be seriously doubted that Congress possesses this power; and under the government of the Confederate States, whose constitution made a similar grant of power to the Confederate Congress, it was held that the general government possessed this power to compel citizens of the country to perform military service in its armies, in time of war.[4]

§ 230. **Regulation of the militia.** — Congress is authorized to "provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."[5] The actual control of the

[1] Slayback *v.* Cushman, 12 Fla. 427; Weaver *v.* Lapsley, 42 Ala. 601; Hall *v.* Keese, 31 Tex. 504; Dorris *v.* Grace, 24 Ark. 326.

[2] Ex parte Mulligan, 4 Wall. 2.

[3] U. S. Const., art. I., § 8, cl. 12.

[4] Barber *v.* Irwin, 34 Ga. 27; Ex parte Tate, 39 Ala. 254; Ex parte Coupland, 26 Tex. 386.

[5] Const., art. I., § 8, cl. 16.

militia is, therefore, reserved to the States, until the President of the United States has exercised the power, which may be given him by Congress[1] to call the State militia into the service of the United States, when the militia becomes for the time being a part of the United States army; and although the States may regulate the appointment of the officers of the militia, not only are these officers subject to the orders of the President, but they are also subordinate to those officers who may be placed by the President over them in general command of the army or of divisions of the army.[2] And when the President, in pursuance of the authority of Congress calls out the militia of the State, he may make his requisition upon the Governor of the State, or directly upon the militia officers. Any one refusing to obey this call subjects himself to punishment under the military laws.[3]

As already stated, the power to regulate and control the militia of the country is expressly reserved to the States; and hence it cannot be doubted that the power of maintaining a militia was not intended to be included in the prohibition by the constitution of the keeping of troops in time of peace by the States.[4] Not only is that true, but it is competent for a State to make it unlawful for any body of men, other than the regularly organized volunteer militia of the State, and the troops of the United States, with an exception in favor of students in educational institutions in which military instruction is given, to associate themselves together as a military company, or to drill or parade with arms in any city or town of the State, without the license of the Governor. Such a statute is not inconsistent

[1] Congress is authorized to "provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." U. S. Const., art. I., § 8, cl. 13.

[2] See Kneedler *v.* Lane, 45 Pa. St. 238.

[3] Houston *v.* Moore, 5 Wheat. 1; Martin *v.* Mott, 12 Wheat. 19.

[4] U. S. Const., art. I., § 10, cl. 3; Luther *v.* Borden, 7 How. 1.

with any constitutional provision, and is a reasonable regulation in the interest of public order.[1]

§ 231. **Taxation.** — The power of taxation may of course be exercised by both the Federal and the State governments. Neither could exercise the other powers vested in it, without the authority to provide by taxation the means of securing the execution of the laws. The constitution of the United States expressly declares that "the Congress shall have power to levy and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."[2] There are only two express limitations upon the power of Congress to levy a tax. One is to the effect that "no tax or duty shall be laid on articles exported from any State."[3] But it has been held that this provision of the constitution is not violated by the regulation which required, as a precaution against fraud, that certain articles intended for export shall be stamped. This is not a tax. It is an ordinary police regulation.[4]

It is also provided that "no capitation or direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."[5] But the term *direct taxes* is used in the constitution in a peculiar sense and includes only capitation and land taxes.[6]

Congress is expressly authorized to impose a license tax upon all trades, manufactures and other occupations. But it is not in the exercise of the ordinary police power. The

[1] Dunne *v.* People, 94 Ill. 120 (34 Am. Rep. 213). See *ante*, § 173.

[2] U. S. Const., art. I., § 8, cl. 1.

[3] U. S. Const., art. I., § 9, cl. 5.

[4] Pace *v.* Burgess, 92 U. S. 372.

[5] U. S. Const., art. I., § 2; § 9, cl. 4.

[6] Hylton *v.* United States, 3 Dall. 171; Pac. Ins. Co. *v.* Soule, 7 Wall. 433; Veazie Bank *v.* Fenno, 8 Wall. 533; Springer *v.* United States, 102 U. S. 586.

ordinary police regulation of trades and professions falls within the power of the States, and the United States cannot determine what trades are injurious, and may therefore be restrained by the imposition of a license. The license fee, which the United States government may exact as a condition precedent to the pursuit of any employment or the manufacture and sale of any product, is a tax, and does not operate directly as an ordinary police regulation. As a measure for enforcing the payment of the license tax, no doubt Congress may prohibit the prosecution of the trade, if the tax is not paid; and in order that illicit trade may be detected, Congress may provide the most stringent regulations for the inspection of the premises of those who are engaged in the trade in question, and require the goods to be stamped, and the like. But these regulations are only lawful as means devised for the collection of the tax, and not as a police measure, designed to restrain the prosecution of the trade. If Congress declares that its purpose, in exacting a license fee, was to lay a tax, or if there is no declared purpose, and the act of Congress falls fairly within the power of Congress to impose a license tax, the constitutionality of the act cannot be questioned on the ground that it is a police regulation, designed to restrict or suppress the objectionable trade or manufacture.

The general rule of constitutional construction applies, which provides that when the language of a statute admits of two constructions, one of which keeps the statute within the constitutional limitations, and the other causes it to violate them, the former construction is invariably adopted. Nor is it possible to give the latter construction, in order to secure an avoidance of the statute on the ground of unconstitutionality, even though it is known beyond a reasonable doubt from facts outside of the statute, that this construction will conform more nearly with the real purpose of the legislators. An interesting case of this kind has lately occurred. At the last meeting of Congress (1886), an act was passed,

laying a tax upon the sale and manufacture of oleomargarine, and providing a rigid system of inspection and stamping of the goods. The law in form is a legitimate exercise of the congressional power of taxation, and it may be true that some of the members of Congress supported the measure for the purpose of raising revenue. But it can hardly be doubted that the promoters and original advocates of the bill intended it to operate as a restriction upon the sale of oleomargarine in the dairy interests, and the raising of revenue was to them a matter of secondary, if of any, importance. But these occult intentions of the advocates of the bill, even if they could be judicially established, could not affect the constitutionality of the law, as far as it does not contain regulations not suitable as a means for securing a proper collection of the tax.[1] Congress is not only unable to prohibit or restrict the prosecution of a trade by the requirement of a license, but it is also denied the power, by granting a license, to authorize the prosecution of a trade, which is prohibited by the laws of the State.[2]

In the federal state, the independence of the Federal and State governments of each other must be guaranteed by the express or implied limitations of the constitution, in order that the success of the system may be assured. And to such an extent is this limitation upon the power of both considered necessary, that it has been held by the courts that neither the United States nor the State can tax the agencies of the government of the other. The State cannot lay a tax upon the securities of the national government.[3]

[1] See Veazie Bank *v.* Fenno, 8 Wall. 533; National Bank *v.* United States, 101 U. S. 1.

[2] License Tax Cases, 5 Wall. 462; Pervear *v.* Commonwealth, 5 Wall. 475; McGuire *v.* Commonwealth, 3 Wall. 387; Commonwealth *v.* Thornley, 6 Allen, —; Commonwealth *v.* O'Donnell, 8 Allen, 548; Commonwealth *v.* Holbrook, 10 Allen, 200; Block *v.* Jacksonville, 36 Ill. 301; State *v.* Carney, 20 Iowa, 82; State *v.* Stulz, 20 Iowa, 488; State *v.* Baughman, 20 Iowa, 497.

[3] "That the power to tax involves the power to destroy; that the power

Nor can the United States lay a tax upon the securities and other agencies of the State government.[1] "In respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by the government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations are subject to the control of another and distinct government, can only exist at

to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." Marshall, Ch. J., in McCulloch *v.* Maryland, 4 Wheat. 316, 413; Weston *v.* Charleston, 2 Pet. 449; Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Society for Savings *v.* Coite, 6 Wall. 594; Van Allen *v.* Assessors, 3 Wall. 573; People *v.* Commissioners, 4 Wall. 244; Bradley *v.* People, 4 Wall. 459; Banks *v.* The Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26. Revenue stamps are not taxable. Palfrey *v.* Boston, 101 Mass. 329. United States treasury notes are not taxable. Montgomery Co. *v.* Elston, 32 Ind. 27. See People *v.* United States, 93 Ill. 30 (34 Am. Rep. 155), in which the power of the State, to tax the property of the United States held by private individuals for any purpose, was denied. See State *v.* Jackson, 33 N. J. 450.

[1] Collector *v.* Day, 11 Wall. 113; Ward *v.* Maryland, 12 Wall. 418; Railroad Company *v.* Peniston, 18 Wall. 5; Fifield *v.* Close, 15 Mich. 505.

the mercy of that government, of what avail are these means if another power may tax them at discretion?" [1] For these reasons it has been held that the State cannot tax the property of a bank, or the bank itself, which has been established by the United States government, as a governmental agency, as was the old Bank of the United States, or the present national banks.[2] So, also, has it been held incompetent for a State to tax the salary of a United States official, or for the United States to tax the salary of a State official.[3] On the same ground, it has been held that the act of Congress, declaring that papers used in judicial process, either as pleadings or as evidence, shall be invalid unless stamped, was unconstitutional in its application to the State courts.[4] And it has likewise been held incompetent for the United States to declare an ordinary contract or deed, which is valid according to the State law, invalid because it has not been stamped.[5]

§ 232. **Regulation of offenses against the law of nations.** — Congress is also given the power "to define and

[1] Nelson, J., in Collector *v.* Day, 11 Wall. 113, 124.

[2] McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* United States Bank, 9 Wheat. 738. See National Bank *v.* Commonwealth, 9 Wall. 353.

[3] Dobbins *v.* Commissioners of Erie Co., 16 Pet. 435; Collector *v.* Day, 11 Wall. 113; Freedman *v.* Sigel, 10 Blatchf. 327.

[4] Carpenter *v.* Snelling, 97 Mass. 452; Green *v.* Holway, 101 Mass. 243 (3 Am. Rep. 339); Atkins *v.* Plimpton, 44 Vt. 21; Griffin *v.* Ranney, 35 Conn. 239; People *v.* Gates, 43 N. Y. 40; Moore *v.* Moore, 47 N. Y. 467 (7 Am. Rep. 466); Hale *v.* Wilkinson, 21 Gratt. 75; Haight *v.* Grist, 64 N. C. 739; Smith *v.* Short, 40 Ala. 385; Davis *v.* Richardson, 45 Miss. 499 (7 Am. Rep. 732); Bumpass *v.* Taggart, 26 Ark. 398 (7 Am. Rep. 623); Union Bank *v.* Hill, 3 Cold. 325; Hunter *v.* Cobb, 1 Bush, 239; Warren *v.* Paul, 22 Ind. 276; Craig *v.* Dimmock, 47 Ill. 308; Jones *v.* Estates of Keep, 19 Wis. 369; Sammons *v.* Holloway, 21 Mich. 162 (4 Am. Rep. 465); Burson *v.* Huntington, 21 Mich. 415 (4 Am. Rep. 497); Duffy *v.* Hobson, 40 Cal. 240.

[5] Moore *v.* Quirk, 105 Mass. 49 (7 Am. Rep. 499); Sayles *v.* Davis, 22 Wis. 225.

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punish piracies and felonies committed on the high seas, and offenses against the law of nations." Piracy is usually defined to be the equivalent of robbery in law, being a forcible deprivation of property upon the high seas.[1] But a robbery at sea, committed in a vessel sailing under the flag of another nation and by one not a citizen of the United States, is not such a piracy as may be punished in the courts of the United States.[2]

§ 233. **The exercise of police power by municipal corporations.** — A large part of the police power of the State is exercised by the local governments of municipal corporations; and the extent of their police power depends upon the limitations of their charters. They are creatures of the State, and the superior control of the State is almost without limit. The police power of a municipal corporation must depend upon the will of the legislature, and in order that a city, town or county may exercise a particular police power, it must be fairly included in the grant of powers by the charter. The construction of the common phraseology of municipal charters, in order to determine what police powers fell within their provisions, would consume too much space to justify an exhaustive discussion in this connection. The subject has already received a full and able treatment by a distinguished American jurist,[3] and does not fall properly within the scope of a treatise on the constitutional limitation upon the American police power. For these reasons, no attempt has been made to present rules for the construction of the charter grants of police

[1] 4 Bl. Com. 71–73; 1 Kent, 183. See United States *v.* Smith, 5 Wheat. 153; United States *v.* Brig Malek Adhel, 2 How. 210.

[2] United States *v.* Palmer, 3 Wheat. 610; United States *v.* Kessler, Baldw. 15.

[3] See Dillon on Municipal Corporations, and Tiedeman's Municipal Corporations, Chapter VIII.

power to municipal corporations. The police regulations of a municipal corporation only concern us in this connection, when they contravene some constitutional limitation, and from this standpoint all the ordinary police regulations have been criticised in these pages.

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